79-1538

No.

In the Supreme Court of the United States

OCTOBER TERM, 1979

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
APPELLANT

v.

VIRGINIA SURFACE MINING AND RECLAMATION
ASSOCIATION, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

JURISDICTIONAL STATEMENT

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

PETER BUSCEMI
Assistant to the Solicitor General

PETER R. STEENLAND, JR.
MICHAEL A. MCCORD
Attorneys
Department of Justice
Washington, D.C. 20530

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The main opinion of the district court (App. D, *infra*, 21a-75a) is not reported. A supplementary opinion of the district court, issued in response to the Secretary of the Interior's motion for a stay (App. B, *infra*, 4a-16a), is also not reported. The opinion of the court of appeals at the preliminary injunction stage (App. E, *infra*, 76a-85a) is reported at 604

F.2d 312. The opinion of the district court at the preliminary injunction stage (App. F, *infra*, 86a-101a) is not reported.

JURISDICTION

The final order of the district court (App. C, *infra*, 17a-20a) was entered on January 3, 1980. An amending order (App. A, *infra*, 1a-3a) was entered on January 21, 1980. The Secretary of the Interior filed a notice of appeal to this Court on February 1, 1980 (App. G, *infra*, 102a-104a). The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Tenth Amendments to the United States Constitution and the relevant portions of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. I) 1201 *et seq.*, are reprinted in App. I, *infra*, 106a-145a.

QUESTIONS PRESENTED

1. Whether Sections 515(d) and (e) of the Surface Mining Control and Reclamation Act of 1977, which prescribe certain performance standards for surface coal mining operations conducted on steep slopes, violate the Tenth Amendment.

2. Whether the district court properly ruled that Sections 515(d) and 522(e) of the Act take private property without just compensation, in violation of the Fifth Amendment.

3. Whether the district court properly enjoined the issuance of summary cessation orders under Section 521(a)(2) of the Act and the imposition of civil penalties under Section 518 on the ground that those provisions violate the Due Process Clause of the Fifth Amendment.

STATEMENT

1. This appeal involves a challenge to the constitutionality of several critical provisions of the Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445, 30 U.S.C. (Supp. I) 1201 *et seq.* Congress passed the Act in order to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations * * *." 30 U.S.C. (Supp. I) 1202(a).[1] The principal regulatory and

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[1] In Section 101(c) of the Act, 30 U.S.C. (Supp. I) 1201(c), Congress announced its finding that

> many surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources * * *.

enforcement provisions of the statute are contained in Title V, 30 U.S.C. (Supp. I) 1251-1279.[2]

Section 501 of the Act establishes a two-stage program for the regulation of surface coal mining. Section 501(a), 30 U.S.C. (Supp. I) 1251(a), directs the Secretary of the Interior to promulgate regulations covering an initial period during which mine operators will be required to comply with only some of the environmental protection performance standards established by the Act. Section 502(c) of the statute specifies which of the performance standards listed in Section 515 must be made applicable during this interim period. See 30 U.S.C. (Supp. I) 1252(c), 1265. In particular, Section 502(c) requires that Section 515(d), setting performance standards for "steep-slope" surface coal mining, must be implemented by the Secretary's interim regulations. In addition, certain other provisions of the Act become immediately effective by their own terms during the interim period. One example is Section 522(e), 30 U.S.C. (Supp. I) 1272(e), which prohibits, with various exceptions, surface coal mining on certain lands or within specified distances of certain structures or facilities. The Secretary promulgated his interim

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[2] Title II of the Act creates the Office of Surface Mining Reclamation and Enforcement ("OSM") within the Department of the Interior. The Secretary of the Interior, acting through OSM, is charged with the principal responsibility for administering and implementing the Act. See 30 U.S.C. (Supp. I) 1211(c).

regulations on December 13, 1977 (42 Fed. Reg. 62639), and they are currently in effect.[3]

The second stage of the regulatory program established by the Act is the permanent phase. Section 501(b) directs the Secretary to promulgate permanent regulations incorporating all the performance standards set forth elsewhere in the Act, including, of course, the "steep-slope" standards described in Section 515(d). The Secretary published his permanent regulations on March 13, 1979 (44 Fed. Reg. 14902), but their effectiveness must await the implementation of a permanent state or federal program in accordance with Sections 503 and 504 of the Act, 30 U.S.C. (Supp. I) 1253, 1254.

Section 502(e) of the Act makes the Secretary responsible for enforcing the interim performance standards. Congress has provided for financial reimbursements to states that actively assist the federal enforcement effort during the interim period (see Section 502(e)(4), 30 U.S.C. (Supp. I) 1252(e)(4)), but, until the permanent phase of the program, the

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[3] Portions of the interim regulations have been challenged in the United States District Court for the District of Columbia, pursuant to Section 526(a)(1) of the Act, 30 U.S.C. (Supp. I) 1276(a)(1). *In re Surface Mining Regulation Litigation*, 452 F. Supp. 327 (D.D.C. 1978); *In re Surface Mining Regulation Litigation*, 456 F. Supp. 1301 (D.D.C. 1978). Some of the statutory provisions at issue in the present case were attacked in the District of Columbia litigation, and the district court sustained the validity of those provisions. See 456 F. Supp. at 1319-1321. Consolidated appeals from other aspects of the district court's decision are pending. Nos. 78-2190, 78-2191, and 78-2192 (D.C. Cir. argued June 5, 1979).

statute does not authorize the Secretary to cede the federal government's independent enforcement role to states that wish to conduct their own regulatory programs. States may continue to issue permits governing surface mining operations during the interim period, but any such permits must comply with the federal interim performance standards. 30 U.S.C. (Supp. I) 1252(b). The Act does not require any state to enforce any of the interim standards. Under Section 502(e), the Secretary's interim regulations and enforcement program are to remain in effect until a permanent state program is approved under Section 503 or a permanent federal program is implemented under Section 504.[4]

Section 503 of the Act provides that any state interested in assuming permanent regulatory authority over surface coal mining operations within its borders must submit a proposed program to the Secretary demonstrating that the state legislature has enacted laws implementing the environmental protection standards established by the federal statute and accompanying regulations and that the state has the administrative and technical ability to enforce those standards. 30 U.S.C. (Supp. I) 1253.[5] The Secretary

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[4] Certain coal mining operations are exempt from the Act's requirements. They include: operations on two acres of land or less; operations involving the extraction of coal for personal, noncommercial use; and operations incident to a publicly financed highway project. 30 U.S.C. (Supp. I) 1278.

[5] Initially, the proposed state programs were to be submitted by February 3, 1979, 18 months after enactment of the federal statute. Exercising his authority under Section 504(a) of the Act, the Secretary postponed the due date until Au-

must approve or disapprove each such proposed program in accordance with the time schedules and procedures established by Sections 503(b) and (c).[6] In addition, the Secretary is required, under Section 504 of the Act, 30 U.S.C. (Supp. I) 1254, to develop a federal program for implementing the federal statutory provisions on a permanent basis in each state that fails to submit or enforce a satisfactory program.

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gust 3, 1979. 44 Fed. Reg. 15324 (1979). Because the Secretary's March 1979 publication of his permanent regulations occurred seven months after the date set by Congress (see 30 U.S.C. (Supp. I) 1251(b)), the United States District Court for the District of Columbia further extended the deadline for submission of state programs to and including March 3, 1980. *In re Permanent Surface Mining Regulation Litigation*, Civ. No. 79-1144 (D.D.C. July 25, 1979 and Aug. 21, 1979). The district court's injunctive order and subsequent opinion are reported at 13 E.R.C. 1447 and 13 E.R.C. 1586. See also 44 Fed. Reg. 60969 (1979) (announcing conforming changes in the Secretary's regulations governing submission of state programs). (The district court litigation in No. 79-1144 involves a challenge to the validity of some of the Secretary's permanent regulations. On February 26, 1980, the district court issued an opinion dealing with approximately half of the challenged regulations. The opinion is not yet reported.)

[6] With the exception of Georgia, Alaska, and Washington, all states in which surface coal mining is conducted submitted proposed state programs to the Secretary by March 3, 1980. On February 4, 1980, the Secretary approved the Texas program, on the condition that the State agree to certain modifications. 45 Fed. Reg. 12998 (Feb. 27, 1980). On February 15, 1980, the Secretary approved parts of the Wyoming program and disapproved other parts. The Secretary has not yet acted on any other proposed state programs, including that submitted by Virginia.

2. On October 23, 1978, the Virginia Surface Mining and Reclamation Association, Inc., 63 of the Association's member coal companies, and four individual landowners filed this suit broadly challenging the constitutionality of Title V of the Act and, in particular, those statutory provisions to be implemented during the interim phase of the regulatory program. The Commonwealth of Virginia and the Town of Wise, Virginia, intervened as plaintiffs. The Virginia Citizens for Better Reclamation, Inc., and the Town of St. Charles, Virginia, intervened as defendants in support of the Secretary's enforcement of the Act.

Plaintiffs advanced several arguments against the Act's validity. They contended: (1) that the statute is beyond the scope of the congressional power to regulate interstate commerce under Article I, Section 8, of the Constitution; (2) that the Act has a disproportionate economic effect in southwest Virginia and thereby violates the equal protection component of the Due Process Clause of the Fifth Amendment; (3) that the Act violates the Tenth Amendment because it usurps an "integral governmental function" traditionally reserved to and performed by the states; (4) that, by imposing certain restrictions and conditions on surface mining operations, the Act effects a taking of private property without just compensation, in violation of the Fifth Amendment; and (5) that the Act's enforcement provisions, especially those establishing a system of civil penalties and authorizing cessation orders against imminently dangerous conditions and practices, deny coal mine operators due process of law in violation of the Fifth Amendment.

On February 14, 1979, after a hearing on plaintiffs' motion for a preliminary injunction, the district court enjoined the Secretary from taking any action to enforce Sections 502-522 of the Act pending final disposition of plaintiffs' action on the merits (App. F, *infra*, 86a-101a). The district court and the court of appeals denied the Secretary's application for a stay pending appeal of the preliminary injunction.

On August 10, 1979, the court of appeals reversed and dissolved the district court's injunction (App. E, *infra*, 76a-85a). The court of appeals held that the district court applied an incorrect standard in determining whether to grant preliminary injunctive relief. In the court of appeals' view (*id.* at 80a-81a), Section 526(c) of the Act, 30 U.S.C. (Supp. I) 1276(c), describes the criteria that should govern requests for interlocutory injunctions against enforcement of all or part of the statute. The district court erred in granting such relief, the court of appeals held, because two of the requirements listed in Section 526(c) were not satisfied. The district court did not determine that plaintiffs were likely to succeed on the merits nor did it find that a preliminary injunction would "not adversely affect the public health or safety or cause significant environmental harm to land, air or water resources." Moreover, the court of appeals observed (App. E, *infra*, 83a), the district court "wholely ignored the Congressional findings set forth in § 101 of the Act." See note 1, *supra*.

While the Secretary's appeal of the preliminary injunction was pending, the district court held a 13-

day trial on plaintiffs' request for a permanent injunction. On January 3, 1980, the court issued an order (App. C, *infra*, 17a-20a) and opinion (App. D, *infra*, 21a-75a) declaring several critical provisions of the Act unconstitutional and permanently enjoining their enforcement. The court rejected plaintiffs' Commerce Clause and equal protection challenges to the Act (*id.* at 26a-29a, 41a-42a). The court held, however, that the Act "operates to displace the states' freedom to structure integral operations in numerous areas of traditional functions and is in contravention of the Tenth Amendment" (App. C, *infra*, 18a; see App. D, *infra*, 30a-41a). In particular, the court ruled that "[t]he portions of the act requiring steep slopes to be restored to approximate original contour are not environmentally sound and do not serve the interests of the federal government and are so burdensome on the Commonwealth of Virginia as to threaten its economy" (App. C, *infra*, 18a). The court therefore enjoined the enforcement of the steep-slope mining standards contained in Sections 515(d) and (e) of the Act, 30 U.S.C. (Supp. I) 1265(d) and (e).

The district court also held that Sections 515(d) and (e) of the Act violate the Just Compensation Clause of the Fifth Amendment. In the court's view, Section 515(d) effects an uncompensated taking of private property by requiring steep-slope coal mine operators to restore the approximate original contour of the land after the completion of mining operations. The court said that this statutory obligation renders it "physically and economically impossible to mine the

coal" on steep slopes (App. D, *infra*, 45a). The court found another unconstitutional taking in Section 522 of the Act, 30 U.S.C. (Supp. I) 1272, subsection (e) of which generally prohibits surface coal mining within 100 feet of any cemetery or the "outside right-of-way line of any public road," or within 300 feet of any public building, school, church, public park, or occupied dwelling.[7] Accordingly, the court declared Sections 522 and 515(d) and (e) unconstitutional "until such time as the federal government sees fit to obtain said land by eminent domain and payment of just compensation" (App. C, *infra*, 19a; see App. D, *infra*, 43a-57a).

Finally, the court considered plaintiffs' due process objections to the enforcement provisions of the Act. The court ruled that, before ordering the immediate cessation of any mining practice or condition, the Secretary must either seek judicial intervention or afford mine operators an opportunity for a hearing. The court held that this requirement applies even in cases where the Secretary determines, on the basis of a federal inspection, that a particular practice or condition "creates an imminent danger to the health

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[7] Section 522(e)(5) provides that the prohibition of surface mining within 300 feet of an occupied dwelling may be waived by the dwelling's owner. Similarly, Section 522(e)(4) permits waivers or adjustments of the prohibition against surface mining within 100 feet of roadways. Furthermore, the prohibitions in Section 522(e) are subject to "valid existing rights" and do not apply to mining operations in existence on the date of the statute's enactment. 44 Fed. Reg. 15342 (1979) (to be codified in 30 C.F.R. 761.3).

or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources." Because Section 521(a)(2) of the Act, 30 U.S.C. (Supp. I) 1271(a)(2), authorizes the issuance of cessation orders in such circumstances without a prior hearing, and because, in the court's view, the statute does not provide sufficient guidance concerning the occasions on which such orders are appropriate, the court declared the statute unconstitutional and enjoined its enforcement (App. C, *infra*, 19a; App. D, *infra*, 57a-74a). Although only Section 521(a)(2) authorizes immediate cessation orders, the court's order enjoined subsections (a)(1) and (a)(3) as well (App. C, *infra*, 19a). The court's opinion stated that "[t]he summary issuance of cessation orders is enjoined until such time as Congress makes provisions to correct the use of subjective criteria by [federal] inspectors" (App. D, *infra*, 73a).

The court found fault with two additional aspects of the Act's enforcement procedures. Under Section 525(c) of the Act, 30 U.S.C. (Supp. I) 1275(c), mine operators subject to a cessation order may seek temporary relief from the Secretary. If the cessation order from which relief is sought has been issued under Section 521(a)(2) or (3), the Secretary must act on the application within five days of receipt. The district court ruled that this statutory five-day period is too long and that the Secretary should be required to grant or deny the operator's request within 24 hours (App. D, *infra*, 73a). Apparently in order to

effectuate this statutory revision, the court's January 3 order enjoined Section 525 in its entirety (App. C, *infra*, 19a). The court also enjoined Section 518 of the Act, 30 U.S.C. (Supp. I) 1268, the statute's penalty provision. Although the court's order seemed to enjoin Section 518 in its entirety (App. C, *infra*, 19a), the accompanying opinion showed that the court disapproved only the final imposition of civil penalties without an opportunity for a prior hearing (see App. D, *infra*, 67a-69a, 74a). The court apparently thought that Section 518, especially when read together with the cessation order provision in Section 521(a)(2), can result in an irrevocable assessment of penalties before any administrative review procedures are made available (App. D, *infra*, 68a-69a).

On January 21, 1980, the district court denied the Secretary's motion for a stay pending direct appeal to this Court (App. A, *infra*, 3a). At the same time, the court issued an order and opinion (App. B, *infra*, 4a-16a) clarifying its January 3 decision. The court modified its earlier order in two respects. First, the court declared that its injunction against enforcement of the steep-slope mining standards contained in Section 515(d) was not intended to "allow[ ] spoil to be placed on the downslope in an uncontrolled manner." The court stated that "[a]ny such downslope spoil placement shall be in a controlled manner meeting environmental protection standards specified by the regulatory authority" (App. A, *infra*, 2a). Second, the court announced that the declaratory and injunctive relief awarded against Sections 518, 521,

and 525 of the Act applies "*only* insofar as those sections relate to summary issuance of cessation orders and civil penalties (App. A, *infra*, 2a-3a; emphasis in original) .

After the January 21 modification, the district court's order had the following effects:

(a) it permitted the dumping of soil on the downslope "in a controlled manner," whereas Section 515 (d)(1) of the Act prohibits such dumping altogether on steep slopes;

(b) it relieved steep-slope coal mine operators of the statutory obligation to restore mined land to its approximate original contour and to cover completely the mining cut's highwall, in accordance with Section 515(d)(2);

(c) it eliminated all the surface mining restrictions in Sections 522(e)(4) and (5) based on proximity to roads, dwellings, schools, churches, parks and cemeteries;

(d) it invalidated Section 521(a)(2) of the Act and required the Secretary to provide an opportunity for a hearing before issuance of a cessation order to a mine operator whose practices create an imminent danger to the public health and safety; [8] and

(e) it apparently prohibited the Secretary from requiring the payment of proposed civil penalties into

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[8] In the event Congress "makes provisions to correct the use of subjective criteria by [federal] inspectors" (App. D, *infra*, 73a), the district court would permit the Secretary to resume the issuance of summary cessation orders, but only if he agrees to rule on an operator's request for temporary relief within 24 hours of receipt instead of within the five-day period provided by Section 525(c).

an escrow account as a precondition for obtaining administrative review of a violation notice or cessation order under Section 518(c).

The Secretary applied to this Court for a stay of the district court's judgment pending appeal (No. A-720). On February 25, 1980, the Chief Justice granted a stay pending further order of the Court, and on March 17, 1980, the Court extended the stay "pending the timely filing and disposition" of the Secretary's appeal (App. H, *infra*, 105a).

THE QUESTIONS ARE SUBSTANTIAL

The district court has declared several subsections of the Surface Mining Act unconstitutional and has enjoined the enforcement of important statutory provisions intended to govern surface mining methods at the overwhelming majority of Virginia's coal mines. The court has also enjoined the issuance of summary cessation orders and the collection of civil penalties prior to administrative review of an alleged violation. The court has thus not only weakened the substantive regulatory requirements applicable to surface coal mines but also deprived the Secretary of two critical enforcement tools provided by the Act. If the decision below is permitted to stand, it will deal a severe blow to the congressional effort to protect the environment and the public health and safety through the effective regulation of surface mining.

The district court's ruling is incorrect for several reasons. In the first place, it accords insufficient deference to the well-established principle that "legisla-

tive Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality * * *." *Usery* v. *Turner Elkorn Mining Co.*, 428 U.S. 1, 15 (1976). Moreover, the decision disregards specific congressional findings concerning the need for and the feasibility of surface mining regulation. The district court's opinion resolves far-reaching constitutional questions without the benefit of a specific factual controversy regarding the effect of the Act on particular coal-mining properties. And most important, the court's interpretation of the Tenth Amendment and the Due Process and Just Compensation Clauses of the Fifth Amendment departs drastically from this Court's precedents. Direct appeal to this Court is authorized by 28 U.S.C. 1252, and we ask the Court to note probable jurisdiction to review the district court's dubious constitutional rulings and to confirm the validity of Congress' comprehensive effort to regulate surface mining in the public interest.

1. The district court ruled that Sections 515(d) and (e) of the Act, which establish performance standards for surface mining on steep slopes,[9] violate

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[9] Section 515(d) requires an operator conducting surface mining on a steep slope (i) to reclaim the mined areas by completely covering the highwall and returning the site to its "approximate original contour," (ii) to refrain from dumping spoil material on the downslope below the bench or mining cut, and (iii) to refrain from disturbing land above the highwall, unless permitted to do so by the regulatory authority. Under Section 515(d)(4), a "steep slope" is defined as "any

the Tenth Amendment (App. D, *infra*, 30a-41a). The district court reached this conclusion on the basis of its "findings" that the steep-slope mining requirements force the Commonwealth of Virginia to relinquish control over land-use planning, deprive the Commonwealth of authority over its economy, and cause actual economic harm (*id.* at 33a-39a). Relying heavily on *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the district court held that the Surface Mining Act "operates to displace the states' freedom to structure integral operations in numerous areas of traditional functions" (App. C, *infra*, 19a).

The district court's decision misapplies *National League of Cities*; the Surface Mining Act regulates only coal mine operators, not states. Unlike the mandatory application of federal minimum-wage legislation to state employees, which the Court disapproved in *National League of Cities*, the steep-slope mining requirements of Sections 515(d) and (e) are directed

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slope above twenty degrees or such lesser slope as may be defined by the regulatory authority after consideration of soil, climate, and other characteristics of a region or State." The term "approximate original contour" is defined in Section 701(2) of the Act. 30 U.S.C. (Supp. I) 1291(2). For a general description of surface mining methods, see H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 76-80 (1977).

Section 515(e) establishes a variance procedure by which an operator may obtain an exemption from the approximate original contour requirements of Section 515(d). In addition, Section 515(c) establishes a separate variance procedure applicable in cases in which an operator extracts coal, not by cutting into the side of a mountain, but by removing and leveling the mountain top. See H.R. Rep. No. 95-218, *supra*, at 101-103.

solely at private activities and do not seek to regulate the "States as States." See 426 U.S. at 845. As this Court emphasized in *National League of Cities* (*id.* at 840), the Tenth Amendment does not restrict Congress' power under the Commerce Clause to regulate nongovernmental activities.

> Congressional power over areas of private endeavor, even when its exercise may preempt express state-law determinations contrary to the result which has commended itself to the collective wisdom of Congress, has been held to be limited only by the requirement that "the means chosen by [Congress] must be reasonably adapted to the end permitted by the Constitution." *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241, 262 (1964).

The district court unsuccessfully attempted to avoid the reasoning of *National League of Cities* by stating that, "[w]hile the act ultimately affects the coal mine operator, its pervasive effect is on the states' legislative authority and on state control of land within its boundaries" (App. D, *infra*, 32a). But the Act does not compel the states to enforce the steep-slope standards or to expend any state funds. The states are encouraged to enforce the Act's provisions, but there is no statutory requirement that the states enforce any particular standard. Furthermore, the regulation of surface coal mining is not the kind of integral governmental function protected by the Tenth Amendment. See *National League of Cities* v. *Usery*, *supra*, 426 U.S. at 851. Regulation of surface coal

mining by the federal government does not threaten the states' "separate and independent existence." *Ibid.*

This reasoning is not affected by the district court's characterization of Sections 515(d) and (e) as land-use measures (App. D, *infra*, 34a-39a). The primary purpose of the steep-slope mining requirements is protection of the environment and the public health and safety. See H.R. Rep. No. 95-218, *supra*, at 80, 120; S. Rep. No. 95-128, 95th Cong., 1st Sess. 50-51 (1977). Any land-use consequences are altogether incidental, especially since the challenged subsections have as their goal the return of land to approximately the same condition as existed before mining began. Once reclamation is complete, the Commonwealth of Virginia and other states remain free to exercise their full powers over the restored land.

The remaining justification asserted by the district court for its Tenth Amendment ruling is that the steep-slope mining requirements will cause serious harm to Virginia's economy and will result in "destruction of the taxing power of certain counties, cities, and towns" (App. D, *infra*, 40a). This conclusion is based primarily on the district court's erroneous premise that the steep-slope requirements are "economically infeasible and physically impossible" (*id.* at 37a). Congress has made contrary findings about the practicability of Sections 515(d) and (e), and those findings are amply supported by the evidence in the legislative record (see page 22 & n.11 *infra*). Even assuming, however, that the Act's requirements will have a measurable impact on the economy of the Commonwealth, this kind of effect, standing alone,

is insufficient to establish a Tenth Amendment violation. In *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508, 534-535 (1941), this Court rejected the theory that an adverse impact on state and local economies and tax revenues imposes a Tenth Amendment barrier to Congress' exercise of its power under the Commerce Clause. In *National League of Cities*, the Court discussed the possible economic impacts of the statute involved (426 U.S. at 846-847), but the Court made clear that the determinative factor was the nature of the federal action and its displacement of integral state functions, not its economic effect. *Id.* at 847. When a federal statute regulates a segment of interstate commerce without in any way forcing a state to participate in the endeavor, the Tenth Amendment is not offended. A contrary rule would distort the holding in *National League of Cities* and would create a serious obstacle to a wide variety of salutary federal economic legislation.

2. The district court's ruling that Sections 515(d) and 522(e) of the Act take private property without just compensation suffers from a fatal threshold deficiency. Neither plaintiffs nor the district court identified any particular piece of property in which plaintiffs have an interest that has allegedly been taken by operation of the statute. The district court rendered its decision under the Just Compensation Clause without reference to particular tracts of land or the extent of diminution in the value of such tracts attributable to the Act. Earlier this Term, the Court stressed the need to evaluate claims of government

takings on the basis of individualized findings regarding all relevant economic factors.

> [T]his Court has generally "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the Government, rather than remain disproportionately concentrated on a few persons." Rather, it has examined the "taking" question by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action —that have particular significance.

Kaiser Aetna v. *United States*, No. 78-738 (Dec. 4, 1979), slip op. 10 (citations omitted). In the absence of such an "ad hoc, factual inquiry," there is no reason to conclude that the Act will always effect a taking of private property, or, indeed, that it will ever do so. For this reason, the taking questions presented to the district court were not ripe for judicial determination.[10]

Nevertheless, the district court held that compliance with the "approximate original contour" requirement of Section 515(d) is "physically and economically im-

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[10] If plaintiffs' just compensation claims had focused on particular properties, resort to the variance procedures and other administrative remedies provided by the Act might have alleviated the alleged harm suffered and thus rendered a constitutional decision unnecessary.

possible" (App. D, *infra*, 45a) and that Section 515 (d) therefore effects a taking of private property without just compensation. The court's decision completely ignores Congress' explicit findings that restoration of steep-slope mines to their approximate original contour is feasible and economically practical. See H.R. Rep. No. 95-218, *supra*, at 120-124. After careful consideration of the available evidence, Congress concluded, not only that such restoration is physically and economically achievable,[11] but also that it was already being accomplished in some Appalachian states. *Id.* at 123-124.

Moreover, under the principles announced in *Goldblatt* v. *Town of Hempstead*, *supra*, once it has been established that a regulation serves a substantial public purpose (as the Act's requirements indisputably do), the only open question under the Fifth Amendment is whether the regulation prevents any beneficial use of the property. As the Court said earlier this Term in *Andrus* v. *Allard*, No. 78-740 (Nov. 27, 1979), slip op. 14: "At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." This principle is dispositive of plaintiffs' Just Compensation Clause challenge to Section 515(d). The statute does

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[11] We particularly invite the Court's attention to pages 98-100 of the House Report. These pages contain photographs of surface mining sites on steep slopes that have been successfully returned to approximate original contour. The results shown belie the district court's assertion that such restoration is physically impossible.

not preclude every use of plaintiffs' property; indeed, it does not preclude coal mining, or even surface coal mining. The Act merely imposes conditions that must be met by mine operators who wish to employ surface mining methods on steep slopes.[12] That is not enough to constitute a taking of private property. See *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 123-131 (1978); *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926); *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922) (finding a taking where there was an actual physical restriction against the removal of coal).

Nor is any taking effected by Sections 522(e)(4) and (5). Those provisions are expressly made subject to valid existing rights and do not apply to coal mining operations existing on the date of enactment. Furthermore, the prohibitions against surface mining within a specified distance of dwellings, public buildings, parks, schools, churches, roads, and cemeteries do not prevent the use of underground mining methods, so long as there are no significant surface effects. The Act does not entail a complete prohibition on the removal of coal from the affected areas. Even if

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[12] Nearly 80% of Virginia's coal can be mined by underground methods. See United States Department of the Interior Federal Coal Management Program, *Final Environmental Statement*, Table 2-2 (1979), relying on a 1977 Bureau of Mines survey entitled *Demonstrated Coal Reserve Base of the United States as of January 1, 1976*. Accordingly, many steep-slope mine operators can avoid the "approximate original contour" requirement by employing a different mining technique.

it did, *Goldblatt* suggests that Section 522(e) would be valid as a reasonable exercise of the governmental power to protect the personal safety and health of the public. See 369 U.S. at 595. Plaintiffs bear the burden of establishing the unreasonableness of the statute,[13] and, at least where there has been no specific showing of the impact of the statute on the value and beneficial uses of a particular tract, a reviewing court should not conclude that "the legislature has acted in an arbitrary and irrational way." *Usery* v. *Turner Elkhorn Mining Co., supra,* 428 U.S. at 15.[14]

3. The district court's due process rulings were both premature and incorrect. Plaintiffs did not allege that they, or any one of them, received a summary cessation order under Section 521(a)(2) or a demand for payment of civil penalties imposed without a hearing. Accordingly, plaintiffs have suffered no denial of due process, and the district court should

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[13] See, *e.g., Bibb* v. *Navajo Freight Lines,* 359 U.S. 520, 529 (1959); *Salsburg* v. *Maryland,* 346 U.S. 545, 553 (1954); *United States* v. *Carolene Products Co.,* 304 U.S. 144, 154 (1938).

[14] Because the district court objected only to provisions contained in Section 522(e), it is unclear why the court's order (App. C, *infra,* 19a) declares all of Section 522 unconstitutional. This aspect of the court's order is especially puzzling because Sections 522(a)-(d) do not become applicable to state and private land until the permanent phase of the Act's regulatory program. These provisions, which establish procedures for designating particular lands as unsuitable for some or all surface mining, have not been applied to plaintiffs or any other private landowners. Accordingly, no justiciable case or controversy exists with respect to Sections 522(a)-(d). *United Public Workers* v. *Mitchell,* 330 U.S. 75, 89-91 (1947).

not have considered their procedural objections to the operation of the Act. The adequacy of enforcement devices established by Congress should not be determined in the absence of a concrete case or controversy. The question of what process is due in a given situation depends in large measure on the particular circumstances involved. For example, the propriety of a summary cessation order will inevitably vary with the gravity of the threat posed by particular surface mining practices and conditions. Without some allegation and showing that the parties challenging the Act's cessation order and civil penalty provisions have suffered or will suffer harm as a consequence of those procedures, a reviewing court should not disturb the enforcement scheme carefully designed by Congress. In any event, neither provision invalidated by the district court is constitutionally defective.

a. The issuance of immediate cessation orders authorized by Section 521(a)(2) fits comfortably within the lengthy line of precedents holding that due process does not always require a prior hearing. This Court has frequently recognized that, in extraordinary and emergency situations, summary administrative action may be justified. See, *e.g.*, *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 677-680 (1974); *Boddie* v. *Connecticut*, 401 U.S. 371, 378-379 (1971); *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599-600 (1950); *Yakus* v. *United States*, 321 U.S. 414, 442-443 (1944), and cases there cited; *Phillips* v. *Commissioner*, 283 U.S. 589, 595-599 (1931); *North American Cold Storage Co.* v.

City of Chicago, 211 U.S. 306 (1908); *Lawton* v. *Steele*, 152 U.S. 133, 140-142 (1894).

In view of the devastating effects of mining disasters, Congress has determined that, in situations involving "imminent danger" to the public health or safety or "significant, imminent environmental harm," the Secretary should be empowered to order an immediate halt to the offending practice or condition. A mine operator aggrieved by such a cessation order may seek temporary relief from the Secretary, and the Secretary must act on such a request within five days of its receipt. See 30 U.S.C. (Supp. I) 1275 (c).[15] If the Secretary denies temporary relief, his action is subject to judicial review under Section 526 (c) of the Act, 30 U.S.C. (Supp. I) 1276(c). Moreover, the cessation order itself is subject to both informal review under Section 521(a)(5), 30 U.S.C.

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[15] The district court held (App. D, *infra*, 73a) that, when the Secretary receives a request for temporary relief from a cessation order, he "should have to grant or deny it within twenty-four (24) hours, rather than five days." The court explained that, in its view, the "five-day lapse may be crucial to the continuation of a coal mine, especially considering the length of time it may take to get a request to the Secretary" (*ibid.*). This aspect of the district court's opinion is an undisguised and unsupportable substitution of a judicial policy preference for that of Congress. Plaintiffs did not demonstrate that the five-day reply period affected them adversely in a particular case or is generally unreasonable. They also introduced no evidence tending to show that a shorter reply period is administratively feasible. The district court record simply provides no basis for the conclusion that the five-day reply period allowed by Section 525(c) offends the requirements of due process.

(Supp. I) 1271(a)(5),[16] and formal review, including an adjudicatory hearing, under Section 525(b), 30 U.S.C. (Supp. I) 1275(b). The statute thus strikes a reasonable legislative balance between the legitimate desire of private enterprise to be heard before submitting to administrative regulation and the overriding governmental interest in protecting the public and the environment from dangerous conditions.

The district court did not disagree with the proposition that, in an emergency setting, the Fifth Amendment tolerates some governmental interference with private property prior to a hearing (App. D, *infra*, 63a-64a, 71a-72a). Nor did the court question the importance of the interests sought to be protected by the statutory enforcement scheme. The court ruled, however, that Section 521(a)(2) is unconstitutional because it does not provide sufficiently objective criteria for summary administrative action.[17]

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[16] Section 521(a)(5) provides that any notice or order that requires the cessation of mining shall automatically expire within 30 days, "unless a public hearing is held at the site or within such reasonable proximity to the site that any viewings of the site can be conducted during the course of public hearing."

[17] Section 701(8) of the Act, 30 U.S.C. (Supp. I) 1291(8), defines "imminent danger to the health and safety of the public" as follows:

> the existence of any condition or practice, or any violation of a permit or other requirement of this chapter in a surface coal mining and reclamation operation, which condition, practice, or violation could reasonably be expected to cause substantial physical harm to persons

The court cited no authority for this holding, and its decision appears to have been based on a conviction that some mine operators have sustained economic harm as the result of summary cessation orders subsequently overturned on administrative appeal. But the possibility of administrative error inheres in any regulatory system; statutory programs authorizing emergency administrative action prior to a hearing are no exception. As this Court explained in *Ewing* v. *Mytinger & Casselberry, Inc., supra,* 339 U.S. at 599:

> Discretion of any official may be abused. Yet it is not a requirement of due process that there be judicial inquiry before discretion can be exercised. It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination.

The relevant inquiry is not whether a summary cessation order should have been issued in a particular case but whether the statutory procedure itself

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outside the permit area before such condition, practice, or violation can be abated. A reasonable expectation of death or serious injury before abatement exists if a rational person, subjected to the same conditions or practices giving rise to the peril, would not expose himself or herself to the danger during the time necessary for abatement.

See also 30 C.F.R. 700.5, 42 Fed. Reg. 62676 (1977) (interim regulation defining both "imminent danger" to the public health and safety and "significant, imminent environmental harm").

is incapable of affording due process. *Yakus* v. *United States, supra,* 321 U.S. at 434-435.

The standards for issuance of immediate cessation orders under Section 521(a)(2) are quite similar to the criteria provided by Congress in other instances where statutory provisions allowing summary administrative action have been upheld against due process challenges. See, *e.g., Ewing* v. *Mytinger & Casselberry, Inc., supra,* 339 U.S. at 595 ("dangerous to health * * * or would be in a material respect misleading to the injury or damage of the purchaser or consumer"); *Fahey* v. *Mallonee,* 332 U.S. 245, 250-251 n.1 (1947) ("is unsafe or unfit to manage a Federal savings and loan association" or "[i]s in imminent danger of becoming impaired"); *Air East, Inc.* v. *National Transportation Safety Board,* 512 F.2d 1227, 1232 (3d Cir.), cert. denied, 423 U.S. 863 (1975) ("emergency requiring immediate action * * * in respect to air safety in commerce").

Perhaps most pertinent to the present case is *Sink* v. *Morton,* 529 F.2d 601 (4th Cir. 1975), which rejected a mine operator's due process attack on the constitutionality of summary enforcement provisions in the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 814.[18] Section 814(c) of the Mine Safety Act permitted a federal inspector to order the immediate withdrawal of all persons from a mine at which he found two or more unwarranted viola-

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[18] The Act was substantially amended by the Federal Mine Safety and Health Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290. See 30 U.S.C. (Supp. I) 814.

tions of mandatory health or safety standards, at least one of which "could significantly and substantially contribute to the cause and effect of a mine safety or health hazard * * *." The inspector was not required to find that a violation could cause "imminent danger." [19] The court of appeals held that the issuance of withdrawal orders without a prior hearing did not violate the Due Process Clause. Although the Secretary relied heavily on *Sink* in the district court in the present case, the court ignored the Fourth Circuit precedent. In addition, the district court explicitly rejected the holding in *In re Surface Mining Regulation Litigation*, 456 F.Supp. 1301, 1319-1322 (D.D.C. 1978), appeal pending on unrelated issues, Nos. 78-2190, 78-2191, 78-2192 (D.C. Cir. argued June 5, 1979), sustaining Section 521(a)(2) and the Secretary's implementing regulations against a due process challenge identical to that involved here.[20] See also *Star Coal Co.* v. *Andrus*,

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[19] Section 814(c) has been redesignated as Section 814(d). 30 U.S.C. (Supp. I) 814(d).

Section 814(a), as enacted in 1969, provided for the summary issuance of an order requiring the immediate withdrawal of all persons from a coal mine in which a federal inspector found an "imminent danger." As amended by the Federal Mine Safety and Health Act of 1977, Section 814(a) no longer provides for "imminent danger" withdrawals. 30 U.S.C. (Supp. I) 814(a). The subsection was not at issue in *Sink*.

[20] Section 526(a)(1) of the Act provides that the United States District Court for the District of Columbia shall have exclusive jurisdiction to review the Secretary's national regulations for both the interim and the permanent phase of the statutory program. 30 U.S.C. (Supp. I) 1276(a)(1).

Civ. No. 79-171-2 (S.D. Iowa Feb. 13, 1980), slip op. 17-18 (upholding Section 521(a)(2) against due process attack).

By requiring more "objective" standards for the issuance of summary cessation orders, the district court improperly substituted its personal views for the considered congressional judgment that "inspectors are in the best position to recognize and control compliance problems." S. Rep. No. 95-128, *supra*, at 90. As the Senate Committee emphasized (*id.* at 91), individual on-site determinations are indispensable because "neither the Congress nor any regulatory authority can totally predict the public and environmental hazards arising from such a complex endeavor as surface coal mining * * *." If the approach adopted by the district court were followed, Congress would be faced with the impossible task of describing in detailed (and perhaps quantifiable) terms every conceivable situation in which an imminent threat to the public health or safety or to the environment might arise. The Due Process Clause imposes no such requirement.

b. The district court's ruling that the Act's civil penalty provisions violate the Due Process Clause appears to be based on a misunderstanding of the statute. No penalties are finally imposed under Section 518 until the alleged offender has been afforded an opportunity for a hearing. Section 518(b) leaves no room for doubt on this point: "A civil penalty shall be assessed by the Secretary only after the

person charged with a violation * * * has been given an opportunity for a public hearing."

Although final assessment of a civil penalty cannot occur until an opportunity for a hearing has been provided, Section 518(c) directs the Secretary, within 30 days of a notice of violation or a cessation order, to inform the mine operator of the proposed amount of the civil penalty to be assessed. Section 518(c) further requires that, if the operator "wishes to contest either the amount of the penalty or the fact of the violation," he must "forward the proposed amount to the Secretary for placement in an escrow account." If, after administrative or judicial review, it is determined that no violation occurred or that the proposed penalty should be reduced, the appropriate amount is promptly returned to the operator with interest.

The district court appears to have confused the actual assessment of a civil penalty, *i.e.*, the entry of a final administrative order, with the Secretary's initial notice to the operator of the amount of the proposed penalty. See App. D, *infra*, 67a-68a & n.20. Furthermore, the district court ignored the requirement in the Secretary's regulations that, if requested by the operator, a conference must be held prior to the time that a proposed penalty is to be paid into an escrow account. 30 C.F.R. 723.17, 42 Fed. Reg. 62703-62704 (1977). Thus, in every instance, the operator will have an opportunity to be heard, even before the temporary deprivation involved in payment of a proposed penalty.

Section 518's requirement that a proposed penalty be placed in escrow before a mine operator can obtain a hearing on the amount of the penalty does not deny plaintiffs due process of law. The Senate Committee Report explains that the requirement was included in Section 518(c) in order to "avoid the problem of noncollection of fines." S. Rep. No. 95-128, *supra*, at 59. The provision is a reasonable solution designed to eliminate the difficulty identified by Congress without imposing significant burdens on mine operators. In the absence of some particularized showing that the statute creates unfair hardship in a given set of circumstances, there is no reason to believe that a mine operator will be harmed by the statutory procedure. The "refund-with-interest" provision in Section 518(c) ensures that operators who prevail on administrative or judicial review will suffer no financial injury. As Mr. Justice White wrote in *Arnett* v. *Kennedy*, 416 U.S. 134, 187 (1974) (concurring and dissenting opinion), "[i]n passing upon claims to a hearing before preliminary but nonfinal deprivations, the usual rule of this Court has been that a full hearing at some time suffices." See *Ewing* v. *Mytinger & Casselberry, Inc.*, *supra*; *Phillips* v. *Commissioner*, *supra*; *North American Cold Storage Co.* v. *City of Chicago*, *supra*; *Scottish Union & National Insurance Co.* v. *Bowland*, 196 U.S. 611, 631-632 (1905); *Springer* v. *United States*, 102 U.S. 586, 593-594 (1881); *Sink* v. *Morton*, *supra*, 529 F.2d at 604 ("Due process does not command that the right

to a hearing be held at any particular point during the administrative proceedings; it is satisfied if that right is given at some point during those proceedings").[21] The civil penalty provisions of the Surface Mining Act therefore do not violate the Due Process Clause.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

PETER BUSCEMI
Assistant to the Solicitor General

PETER R. STEENLAND, JR.
MICHAEL A. MCCORD
Attorneys

APRIL 1980

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[21] But see *Star Coal Co.* v. *Andrus*, *supra*, slip op. 18-19 (concluding that there is a substantial likelihood that the escrow requirement in Section 518(c) violates due process).

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

Civ. O.B. #2, p. 158

Civil Action No. 78-0224-B

[Filed Jan. 21, 1980]

VIRGINIA SURFACE MINING AND RECLAMATION ASSN., INC., ET AL., PLAINTIFFS

v.

CECIL D. ANDRUS, Secretary, Department of Interior, ET AL., DEFENDANTS

ORDER

This cause came on to be heard again upon the defendant's motion for a stay pending appeal pursuant to Rule 62(c). It appearing to the court from affidavits filed in support of the motion for a stay that this court's Order of January 3, 1980, needs clarification and modification, it is hereby ADJUDGED and ORDERED that Paragraphs 5 and 8 of the Order of January 3, 1980, be and the same are hereby amended to read as follows:

(5) The Surface Mining Control and Reclamation Act operates to displace the states' freedom to structure integral operations in numerous areas of tradi-

tional functions and is in contravention of the Tenth Amendment; however, the court is of the opinion that the interests of the state and federal government must be balanced to determine the appropriate relief to be granted. The portions of the act requiring steep slopes to be restored to approximate original contour are not environmentally sound and do not serve the interests of the federal government and are so burdensome on the Commonwealth of Virginia as to threaten its economy. The federal government will not be harmed by the permanent injunction of this provision of the act, therefore, it is hereby ADJUDGED and ORDERED that § 515(d) of the act, 30 U.S.C. § 1265(d), (e), are hereby permanently enjoined.

This portion of the Order enjoining § 515(d) and (e), 30 U.S.C. § 1265(d), (e), shall not be construed as allowing spoil to be placed on the downslope in an uncontrolled manner. Any such downslope spoil placement shall be in a controlled manner meeting environmental protection standards specified by the regulatory authority.

(8) The act also provides for summary issuance of cessation orders and civil penalties, which have been shown to deprive mine operators of procedural due process of the law as guaranteed by the Fifth Amendment. Therefore, § 518, 30 U.S.C. § 1268, § 521, 30 U.S.C. § 1271, and § 525, 30 U.S.C. § 1275, are permanently enjoined *only* insofar as those sections relate to summary issuance of cessation orders

and civil penalties. Cessation orders and civil penalties may be issued in accordance with the opinion of this court entered on January 3, 1980. This order does not affect issuance of violation notices under § 521 or their review under § 525.

The Commonwealth of Virginia has requested the court to amend its Order of January 3, 1980, to rule upon the complaint filed by the Commonwealth of Virginia pertaining to cut-off of funds which is contained in a supplemental complaint in this cause. A motion was made on page 1073 of the Record to place this amended complaint on the inactive docket and make no ruling on the same at that time, therefore, it is hereby ORDERED that the supplemental complaint of the Commonwealth of Virginia be placed on the inactive docket to be reinstated upon a proper motion by the Commonwealth of Virginia.

The defendants' motion for a stay pending appeal is hereby DENIED.

The Clerk of this court is directed to send certified copies of this Order to counsel of record.

ENTER: This 21 day of January, 1980.

/s/ Glen M. Williams
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

Civil Action No. 78-0224-B

[Filed Jan. 21, 1980]

VIRGINIA SURFACE MINING AND RECLAMATION ASSN., INC., ET AL., PLAINTIFFS

TOWN OF WISE, VIRGINIA, INTERVENOR-PLAINTIFF

COMMONWEALTH OF VIRGINIA, INTERVENOR-PLAINTIFF

v.

CECIL D. ANDRUS, Secretary, Department of Interior, ET AL., DEFENDANTS

MEMORANDUM OPINION

Defendant in the above styled case has moved the court for an Order staying enforcement of the Final Order entered herein on January 3, 1980, pending the disposition of appellate review. Defendant has also requested expeditious consideration of the motion for stay, and has submitted affidavits of Walter N. Heine, Director, Office of Surface Mining Reclamation and Enforcement, and Patrick B. Boggs, Deputy Director, Region 1, Office of Surface Mining Reclamation and Enforcement, in support of the motion. Plaintiffs have submitted the affidavits of

Danny R. Brown, Commissioner of Virginia's Division of Mined Land Reclamation of the Department of Conservation and Economic Development, and J. Steven Griles, Executive Assistant of Virginia's Department of Conservation and Economic Development, in support of their opposition to defendant's motion for stay.

A party seeking a stay must show (1) that he will likely prevail on the merits of the appeal, (2) that he will suffer irreparable injury if the stay is denied, (3) that other parties will not be substantially harmed by the stay, and (4) that the public interest will be served by granting the stay. *Long* v. *Robinson*, 432 F.2d 977 (4th Cir. 1970). Because it is this court's firm belief that plaintiff interest will be substantially harmed by operation of a stay, for reasons stated below and in previous opinions, and that the defendant's and public's interest will not be harmed by a stay, the motion for a stay is denied. The court, however, will clarify part of its Order of January 3, 1980, to correct any misunderstandings, as will be explained below.

The United States Court of Appeals for the Fourth Circuit cautions that a district court judge must give applicants for a stay "full opportunity to develop the facts with regard to a stay beyond those which were adduced at the trial." 432 F. 2d at 979. Consequently, the court will closely examine the affidavits submitted with the motion.

The court notes at the outset that the above case has been pending before this court since October 23,

1978, and the court has received in evidence fourteen volumes of testimony and hundreds of exhibits. Numerous witnesses, many of whom are experts, have submitted themselves to cross examination, and during that time neither Mr. Heine nor Mr. Boggs has appeared before this court to be cross-examined, but have submitted affidavits. While the court will duly consider these affidavits, they must be examined along with the evidence of witnesses who have appeared in person and have been cross-examined.

Mr. Heine, in his affidavit, outlines his experience in Pennsylvania in the coal industry and as a state official in Pennsylvania up until 1977, and based on this experience expresses an opinion that the return to approximate original contour is environmentally sound and can be achieved both physically and economically. As part of his credentials, Mr. Heine points out that he helped draft the law that is before the court and is currently director of the Office of Surface Mining Reclamation and Enforcement.

Mr. Heine's affidavit illustrates quite vividly the problem inherent in the act, namely, that a program which worked well for Mr. Heine in Pennsylvania, does not work the same in a state such as Virginia. Therefore, in drafting the act, Mr. Heine foisted upon Virginia a program that was well suited to Pennsylvania but disastrous to Virginia. Part of the evidence presented in this case *by the federal government* was the testimony of Billy R. Loughry, a strip miner from Rochester Hills, Pennsylvania. Mr.

Loughry testified that he has mined successfully in Pennsylvania and met the requirements of return to approximate original contour, elimination of highwalls, and no placement of spoil on the downslope, and has made a profit. Mr. Loughry further testified, after observing the terrain in Virginia and the overburden, that it would be physically impossible to make a complete backfill and restore to the approximate original contour on Virginia's steep slopes, and that it would be impossible "to make any money at all." (T. 1822-1842).

The evidence presented to this court overwhelmingly indicates that restoring mined land to approximate original contour on steep slopes is not environmentally sound, *e.g.*, testimony of Benjamin C. Green, T. at 2532-2610; Donald Clay Haney, T. at 2611; John D. Robins, T. at 2644-2673; Richard G. Alnes, T. at 2690-2705; Richard M. Smith, T. at 617-630, and that it increases erosion and creates a dangerous mass that causes the sediment to flow down mountains and fill streams. In addition, as the court cited in its opinion in this case, studies made for the Department of Interior and Congress show that restoration to approximate original contour is environmentally unsound. Therefore, this court is inclined to believe those witnesses who have testified and been cross-examined rather than those who had the opportunity to testify and chose to file affidavits.

Mr. Heine also maintains in his affidavit that the Order of this court enjoining § 515(d) and (e), 30 U.S.C. § 1265(d), (e), allows the operators to place

spoil on the downslope of a steep slope mining operation. Mr. Heine's reading of this court's opinion is overbroad, and is contrary to the opinion of John R. Woodrum, an attorney with the Office of the Solicitor, U. S. Department of the Interior, who informed Dr. Charles A. Beasley, Acting Regional Director of OSM, in a memorandum regarding this court's opinion that the "requirement that all spoil be disposed of in the mine workings or in an approved fill area remain[s] intact." [1] The court's opinion does not enjoin the prohibition against placement of spoil on the downslope; § 515(d) and (e) is enjoined insofar as it requires a return of mined land on steep slopes to approximate original contour or elimination of all highwalls. To prevent the confusion, however, that is apparent from the divergence of opinion between Mr. Heine's affidavit and Mr. Woodrum's memorandum, the court will clarify its Order to make it clear that the portion of the Order enjoining § 515(d) and (e), 30 U.S.C. § 1265(d), (e), should not be construed as allowing spoil to be placed on the downslope in an uncontrolled manner.

With regard to Mr. Heine's comments regarding § 522, 30 U.S.C. § 1272, the court has not enjoined this section, but rather has issued a declaratory judgment on its constitutionality. The court has no quarrel with Mr. Heine's comments that in many instances

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[1] Mr. Woodrum's memorandum was submitted to the court as part of the affidavit of J. Steven Griles, Executive Assistant of Virginia's Department of Conservation and Economic Development.

serious injury may be caused by mining near dwellings, roads, churches, and graveyards. On the other hand, mining may also be conducted in those areas without harm to anyone. At any rate, the complete prohibition of mining in these areas constitutes a "taking" under the Fifth Amendment when no compensation has been made. If the federal government wants all surface mining stopped in Virginia, it has the power to do so by exercising its power of eminent domain and paying for the property. Mr. Heine obviously is one of those bureaucrats referred to in the court's opinion who thinks nothing of depriving people of their property to accomplish his own ideas of what is right for society in general. One wonders if he would feel the same if his property were taken by the federal government.

Mr. Heine attaches with his affidavit a letter from William G. Kenton, a member of the Kentucky House of Representatives, addressed to the Attorney General of Kentucky requesting that a suit be instituted by Kentucky similar to the suit before this court. Mr. Heine attaches the letter to demonstrate another element of irreparable harm that will result from the court's order: "unfair competitive advantage that was obtained by Virginia operators as a result of the Order." The thrust of Mr. Kenton's letter, however, is to say that Virginia and Indiana have filed suit, therefore, why hasn't Kentucky? It is the act Mr. Kenton complains of and not this court's decision. He states that Kentucky has suffered intolerable unemployment in the coal counties and that Kentucky faces

a similar if not identical threat to its economy as a result of the act. The defendant has argued throughout this case that the act poses no threat to the economy and is going smoothly in other states. Mr. Kenton's letter also supports the opinion of this court that the federal act affects the state as a sovereign entity and not just private interests. He states as follows: "the health of Kentucky's coal industry will have a direct bearing on the ability of the 1980 session of the General Assembly to fund important and necessary programs throughout our Commonwealth." The federal act does, as Mr. Kenton states, affect the state of Kentucky as a state, just as it affects Virginia as a state.

The court will now examine the affidavit of Patrick B. Boggs, Deputy Director of OSM, Region 1. Mr. Boggs has held this position since May 1979. Prior to May 1979, Mr. Boggs was Deputy Director of the West Virginia Department of Natural Resources beginning in 1977. In paragraph 9 of Mr. Boggs' affidavit, Mr. Boggs generalizes that operators in West Virginia have had no problems eliminating highwalls and restoring to approximate original contour. Mr. Boggs' predecessor as Deputy Director of West Virginia Department of Natural Resources, Mr. Green, testified in person at the trial of this case and was cross-examined. Mr. Boggs' conclusions are contradictory to the sixty pages of Mr. Green's testimony. Mr. Green testified that he was one of the leading advocates of federal legislation regulating surface mining and had helped to draft the 1963, 1967, 1971,

1976, and 1977 amendments to the West Virginia Surface Mining Act. Prior to the passage of the federal act for the period 1971 to 1977, West Virginia had a system that permitted leaving a maximum of thirty feet of the highwall. The spoil material was stacked against the highwall but not to the top and a drainage ditch was cut above the highwall. Mr. Green testified that approximate original contour "is a misnomer and an impossible situation from an environmental point of view, if you take the material to the top of the wall, you blend in and complement the surrounding slopes, then you have greatly accelerated the erosion and sediment control problems that you are, of course, duty bound to prevent." T. at 2544. After the federal act went into existence, West Virginia dropped from being number one coal producer in the nation to number three, and the level of production dropped to that of 1922. At the time of trial in this case, six thousand miners were unemployed in the state; mining on the steep slopes of West Virginia had been drastically scaled back since the federal act came into being. The court feels compelled to accept the testimony of Mr. Green who appeared before this court, as opposed to the affidavit of Mr. Boggs.

In paragraph 10 of Mr. Boggs' affidavit he questions the accuracy of this court's summary of the evidence regarding Black Creek Mining Company. This is the first contradiction offered to this testimony, which was presented on February 13, 1979. At that time, the federal inspector involved in this incident,

Douglas Stone, was present and testified and did not dispute it. The Commonwealth of Virginia has contradicted Mr. Boggs' statement; the company is not operating in Virginia, rather a subcontractor is presently mining the permit. *See* affidavit of Danny R. Brown at 9.

The principal thrust of Mr. Boggs' affidavit is that this court's injunction prevents the federal government from enforcing the act. This is also contained in Mr. Heine's affidavit, p. 5 and 6. It is not the court's intention to prevent the OSM from enforcing the act. There is no logical reason OSM cannot fully enforce the act, and at the same time afford the mine operators due process. The court has enjoined the summary issuance of cessation orders and fines without a hearing. In the event this court's order has been misunderstood, the court will modify its order so that it will be clear that OSM *can* issue cessation orders and levy penalties if a timely due process hearing is provided in accordance with the court's Memorandum Opinion issued on January 3, 1980, and that issuance of violation notices has not been affected by the Order.

Without attempting to enumerate all the powers inspectors have which are not enjoined by the court, the court will point out a few left to OSM during the interim period: (1) the power to issue violation notices under § 521, 30 U.S.C. § 1271; (2) the power to issue cessation notices and levy penalties in accordance with this court's opinion of January 3, 1980; (3) the power to suspend or revoke permits, 30

U.S.C. § 1271(a)(4); the power to have the Attorney General get injunctive relief in U. S. district courts for all types of violations of the act, 30 U.S.C. § 1271(c).

In spite of the foregoing powers, Mr. Boggs has stated under oath and released the statement to the press and television throughout the country that the "public health and safety will be adversely affected by the absence of OSM enforcement capability in Virginia." In addition to the powers enumerated above, OSM may still regulate surface mining in Virginia under the interim program in many harsh ways in which surface miners, according to the evidence, will have the utmost difficulty complying with, *e.g.*, restoration of land to uses which it was capable of supporting prior to any mining, or a higher or better use; restoration to approximate original contour and elimination of highwalls on all slopes subject to variances to be permitted by proper authority; strict provisions for removal of topsoil; strict drainage regulation; regulation of explosives and blasting; and, revegetation responsibility.

In conclusion, it is this court's opinion that defendant has failed to sustain the burden of proof that must be met before its motion for a stay can be granted. The statements of Mr. Heine and Mr. Boggs concerning the environmental harm that will result from the injunction fail to overcome the voluminous testimony to the contrary that was placed before this court. In addition, defendart argues that the federal

government will be unable to enforce the Surface Mining Control and Reclamation Act of 1977. Review of the act reveals that most of the powers granted to the regulatory agency are left intact by the court's opinion. OSM can still grant cessation orders or levy penalties provided that the operators are given full and adequate opportunity to be heard. The approximate original contour provision, which was struck down on two constitutional grounds, has been shown to be unsuited to Virginia's terrain and environmentally unsound. It is common sense that if you pour a glass of water on a mountain with a steep slope and loose dirt, the faster the run-off, the greater the pollution; on the other hand, if you step the water down by having benches to slow the run-off, the slower the water, the less the sediment. Furthermore, there are many powers left to the government to enforce the act. Defendant has, therefore, failed to prove that it will suffer irreparable injury if the stay is denied and that the public interest will best be served by granting the stay. Indeed, this court must conclude that the public interest will best be served by a refusal to stay the judgment.

In addition, defendant has failed to show that it will likely prevail on the merits of its appeal, not having submitted any argument or evidence on this point. The court feels its decision of January 3, 1980, was correct, and the defendant has not changed the court's opinion on the constitutional questions involved.

Defendant raises one additional point that the court feels compelled to comment on. Mr. Boggs contends in his affidavit that the Commonwealth of Virginia has failed to adequately enforce the reclamation laws and also lacks the enforcement tools with which to deal with the problems raised by surface mining. The state officials who represent the Commonwealth in this matter vigorously deny this, see affidavits filed on January 18 and 21, 1980, and have made accusations that the federal government has hired their inspectors by offering more pay and that OSM has failed to cooperate with them. This is not an issue before this court; however, it is difficult to understand OSM's complaint, assuming it is true, since OSM will have total power to eliminate the state from any control, if it determines the act will be inadequately enforced. Furthermore, by January of 1981 the federal government will either approve or disapprove the permanent state program. If the program is not approved, then the federal government can refuse to turn control over to the state, and the state can sue in federal court in Richmond to decide the issue. At that time, this issue will properly be before a United States district court.

For the reasons stated above, and because plaintiffs will suffer irreparable injury if a stay is granted, defendant's motion will be denied. An Order will be entered clarifying and modifying Paragraphs 5 and 8 of the Order dated January 3, 1980, and denying the motion for a stay.

The Clerk of this court is directed to send certified copies of this Memorandum Opinion to counsel of record.

ENTER: This 21st day of January, 1980.

/s/ Glen M. Williams
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

Civil Action No. 78-0224-B

[Filed Jan. 3, 1980]

VIRGINIA SURFACE MINING AND RECLAMATION ASSN., INC., ET AL., PLAINTIFFS

v.

CECIL D. ANDRUS, Secretary, U. S. Department of the Interior, ET AL., DEFENDANTS

FINAL ORDER

In accordance with a Memorandum Opinion filed this day that contains this court's findings of fact and conclusions of law, it is hereby ruled and ORDERED that:

(1) Defendants' motion to dismiss is overruled.

(2) Since none of the plaintiffs have clearly shown that they are aggrieved by Title IV of the Surface Mining Control and Reclamation Act of 1977, relating to abandoned mine reclamation, and since the facts concerning this portion of the act are not fully articulated, this court makes no ruling regarding any of the constitutional aspects of this portion of the act.

(3) This court has jurisdiction over all parties and

all issues involved in this case; the plaintiffs have standing to adjudicate all issues raised in this case; all issues are considered ripe for adjudication; and plantiffs are not required to exhaust administrative remedies.

(4) Title V of the Surface Mining Control and Reclamation Act is hereby declared to be a valid exercise of the power of Congress to regulate interstate commerce and is rationally based.

(5) The Surface Mining Control and Reclamation Act operates to displace the states' freedom to structure integral operations in numerous areas of traditional functions and is in contravention of the Tenth Amendment; however, the court is of the opinion that the interests of the state and federal government must be balanced to determine the appropriate relief to be granted. The portions of the act requiring steep slopes to be restored to approximate original contour are not environmentally sound and do not serve the interests of the federal government and are so burdensome on the Commonwealth of Virginia as to threaten its economy. The federal government will not be harmed by the permanent injunction of this provision of the act, therefore, it is hereby ADJUDGED and ORDERED that § 515(d) and (e) of the act, 30 U.S.C. § 1265(d), (e), are hereby permanently enjoined.

(6) Title V of the Surface Mining and Reclamation Act of 1977 is hereby determined and adjudged not to be in contravention of the equal protection and

substantive due process provisions of the Fifth Amendment.

(7) Section 515, 30 U.S.C. § 1265, and § 522, 30 U.S.C. § 1272, effectively prohibit the mining of a person's private porperty, thereby resulting in a physical property restriction and a nearly complete diminution in the value of the land, as well as loss of future profits. Therefore, § 515(d) and (e), 30 U.S.C. § 1265(d), (e), and § 522, 30 U.S.C. § 1272, and any other provision of 30 U.S.C. § 1265 that by inference may require restoration of steep slopes to approximate original contour, are hereby declared and adjudged to be unconstitutional as a taking of private property without just compensation in contravention of the Fifth Amendment of the United States Constitution, until such time as the federal government sees fit to obtain said land by eminent domain and payment of just compensation.

(8) The act also provides for summary issuance of cessation orders and civil penalties, which have been shown to deprive mine operators of procedural due process of the law as guaranteed by the Fifth Amendment. Therefore, § 518, 30 U.S.C. § 1268, § 521(a)(1)-(3), 30 U.S.C. § 1271(a)(1)-(3); and § 525, 30 U.S.C. § 1275, are permanently enjoined.

The court, having ruled on all issues deemed appropriate in this cause, ORDERS that the case be stricken from the docket.

The Clerk of this court is directed to send certified copies of this Final Order to counsel of record.

ENTER: This 3 day of January, 1980.

/s/ Glen M. Williams
United States District Judge

A TRUE COPY, TESTE:
JOYCE F. WITT
Clerk

By: /s/ J. Todd
Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

Civil Action No. 78-0224-B

[Filed Jan. 3, 1980]

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., ET AL., PLAINTIFFS

v.

CECIL D. ANDRUS, Secretary, U. S. Department of the Interior, ET AL., DEFENDANTS

MEMORANDUM OPINION

This is an action in which plaintiffs seek a judgment declaring that various provisions of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328, are unconstitutional and an injunction to prevent the Secretary of the Department of the Interior from enforcing those provisions. Plaintiffs, including intervenors, are the Virginia Surface Mining and Reclamation Association, Inc., which is a voluntary association of coal producers engaged in surface coal mining operations in the Commonwealth of Virginia, sixty-three member coal companies, four individual landowners, the Town of Wise, Virginia, and the Commonwealth of Virginia. Plaintiffs assert that the act is neither authorized by the commerce

clause nor any other provision of the Constitution and is not rationally based; that the act is in contravention of the Tenth Amendment; that the act disproportionately affects the interests of southwest Virginia coal mine operators and is not rationally based and is, therefore, in violation of the equal protection and substantive due process guarantees of the Fifth Amendment; that the act constitutes a taking of private property without just compensation in violation of the Fifth Amendment; and that certain enforcement provisions of the act violate the procedural due process requirement of the Fifth Amendment. A trial on the merits having been concluded, the matter is now before the court for final disposition.

The Surface Mining Act is a comprehensive statute designed to provide a set of national environmental performance standards to be applied principally to coal surface mining operations and to be enforced by the state with backup authority in the Department of the Interior, acting through the newly created Office of Surface Mining Reclamation and Enforcement. The act establishes a two-tier regulatory program designed to implement its objectives. Section 501(a) of the Act, 30 U.S.C. § 1251(a), required the Secretary to promulgate regulations establishing an interim regulatory program for surface coal mining and reclamation performance standards used on and incorporating the provisions set out in § 502(c) of the act, 30 U.S.C. § 1252(c), and any other provisions that the act makes immediately effective. The performance standards required by the act during

this first-tier interim regulatory phase, which is now in effect, include provisions for the restoration of land to its prior condition, restoration of land to its approximate original contour, segregation and stabilization of topsoil, minimization of disturbances to the hydrologic balance and to water quality, the construction of coal mine waste piles used as dams and embankments, the use of explosives, revegetation of mined areas, and spoil disposal. § 515(b), 30 U.S.C. § 1265(b). *See* note 14 *infra*. New surface coal mining operations commencing on or after February 3, 1978, were required to comply with the performance standards of the interim regulations when the operations began and all surface mining operations that commenced prior to February 3, 1978, with certain limited exceptions, were required to comply with the performance standards of the interim program by May 3, 1978. § 502(c), 30 U.S.C. § 1252(c). The second-tier regulatory program, the permanent program, is not scheduled to go into effect until June 3, 1980, and is, therefore, not in issue.

In addition to establishing environmental performance standards applicable to all surface mining operations, Title IV of the act, §§ 401-413, 30 U.S.C. §§ 1231-1243, establishes an abandoned mine reclamation program. In the exercise of its discretion, however, the court will not grant declaratory judgment as to the provisions of that title. While plaintiffs have launched a broad-based constitutional attack on the act in its entirety, the thrust of their challenge has been directed particularly to the con-

stitutionality of Title V of the act, §§ 501-529, 30 U.S.C. §§ 1251-1279, which sets forth the authority to regulate surface mining, the environmental protection standards, and the pertinent procedural and enforcement mechanisms of the act. Very little, if any, challenge has been mounted to the provisions for abandoned mine reclamation. The issues involved in plaintiff's challenge to Title V, although similar in certain respects, are clearly separable from the issues involved in plaintiffs' challenge to Title IV. Likewise, the provisions of each title are such that constitutional questions regarding one do not of necessity implicate the other. Furthermore, it is the expressed intention of Congress that the provisions of the act be treated as severable so that a determination that any particular provision is invalid will leave intact the remainder:

> If any provision of this Act or the applicability thereof to any person or circumstances is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

Title VII, § 707, 30 U.S.C. § 1297. As the present action is one for declaratory relief under 28 U.S.C. § 2201, the granting of relief rests in the sound discretion of the trial court exercised in the public interest. *Brillhart* v. *Excess Insurance Co.*, 316 U.S. 491 (1942). It is within the discretion of the district court, therefore, to deny declaratory relief as to any matter which the court finds not to be clearly articu-

lated. *See Public Affairs Press* v. *Rickover*, 369 U.S. 111 (1962); *Eccles* v. *Peoples Bank*, 333 U.S. 426 (1948). As the court finds the questions concerning Title V of the act to be capable of resolution without regard to Title IV, and as the court finds the challenges to the latter to be less than clearly presented, declaratory relief as to the validity of Title IV will be denied.

I.

EXHAUSTION OF ADMINISTRATIVE REMEDIES AND RIPENESS

Defendants contend that the suit has been improperly brought before this court because plaintiffs have not exhausted their administrative remedies. This action, however, is a direct constitutional challenge to Title V of the act. There is no need to exhaust administrative remedies since neither administrative law judges nor review boards have jurisdiction to decide constitutional issues. *See, e.g., Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975); *Johnson* v. *Robison*, 415 U.S. 361, 368 (1974); *Virginia Chapter Associated General Contractors* v. *Kreps*, 444 F. Supp. 1167, 1179 (W. D. Va. 1978). Therefore, this action has been properly brought under 28 U.S.C. § 1331 for this court to decide the constitutionality of the act.

Defendants also argue that the action is untimely because plaintiffs' claims are not ripe for adjudication since the permanent program phase of the act's regulatory program will not be in force until 1980.

The plaintiffs are primarily attacking the requirement that the steep slopes of Virginia be restored to their approximate original contour after being surface mined. Title V, § 515(d)(2), 30 U.S.C. § 1265 (d)(2). This provision is in full force and effect at this time. In addition, the sanctions for noncompliance with this provision are also in effect. The plaintiffs are presently aggrieved by operation of the act, and, therefore, the constitutional issues are ripe to be decided. *See Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 81-82 (1978); *United Public Workers* v. *Mitchell*, 330 U.S. 75, 89 (1947).

II.

THE COMMERCE POWER

Plaintiffs maintain that the act, "in purporting to regulate the use of private, non-federal lands within a state," exceeds the power of Congress to regulate interstate commerce. This court finds that Congress' enactment of the federal surface mining act is within the scope of the commerce clause, but is unconstitutional because it transcends the constitutional barrier imposed by the Tenth Amendment. *See* Part III *infra*.

This court must defer to the congressional finding in § 101 of the act, 30 U.S.C. § 1201(c), that surface coal mining has adverse effects on commerce.[1] When

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[1] The section reads in full: Congress finds and declares that —(c) many surface mining operations result in disturbances of surface areas that burden and adversely affect commerce

faced with a challenge to the commerce power of Congress to enact particular legislation, a court may neither examine the motive or purpose behind the legislation, *United States* v. *Darby*, 312 U.S. 100, 115 (1941), nor substitute its own judgment for that of the Congress. *See generally, Noble State Bank* v. *Haskell*, 219 U.S. 575, 580 (1911) (Holmes, J.).[2]

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and the public welfare by destroying or diminishing the utility of land for forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources . . . .

The evidence presented at trial indicated that surface mining may not be as detrimental to the environment as other activities. While any disturbance of land obviously pollutes streams, calculations in the seven county area of Virginia show that fifty-four percent of suspended solids in the water came from agriculture and seventeen percent from active surface mining. Furthermore, the highest level of sedimentation of streams in the eastern United States is in the Bluegrass Section of Kentucky with its horse and tobacco farms and similar areas in central Ohio and Tennessee where no mining occurs. Also, no solid evidence was presented to the court that surface mining causes flooding; various studies to date show that strip mining does not cause flooding.

[2] This principle was strongly stated in the dissent of Justice Frankfurter in *Trop* v. *Dulles*, 356 U.S. 86, 120 (1958):

> It is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations on its own power, and this precludes the Court's giving effect to its own notions of what is wise or politic. That self-restraint is the essence of observation of the ju-

Rather, a court is limited to the determination of whether Congress had ". . . a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce. . . ." *Katzenbach* v. *McClung*, 379 U.S. 294, 303 (1964).

Of paramount importance to the present inquiry into commerce power is the congressional determination that "surface and underground coal mining operations affect interstate commerce. . . ." 30 U.S.C. § 1201(j). There is no question that coal moves in interstate commerce and that its production has a substantial effect on the national economy. Coal produced in Virginia is shipped to other states in the nation. It is one of our nation's most abundant natural resources representing over ninety percent of our total hydrocarbon energy reserves. *See* H.R. Rep. No. 218, 95th Cong. 1st Sess., 71-76 (1977). The Surface Mining Control and Reclamation Act of 1977 is an attempt by Congress to insure that surface mining of this valuable commodity is accomplished with regard to its impact on interstate commerce and the public welfare. Congressional recognition of the enormous and multi-faceted implications for commerce of improper reclamation is embedded in Title 1, § 101, 30 U.S.C. § 1201, and pervades the act's legislative history.[3] Congress considered improper surface min-

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dicial oath, for the Constitution has not authorized the judges to sit in judgment of the wisdom of what Congress and the Executive Branches do.

[3] The act's legislative history is summarized in *Symposium, The National Coal Issue*, 81 W. Va. L. Rev. 553, 775 (1979).

ing and reclamation a threat to the productivity of the mined land in terms of its ability to support other important forms of commerce. H.R. Rep. No. 218, 95th Cong., 1st Sess. 73-76, 105-06, 116-20 (1977). Surface mining of coal in the United States may involve the temporary or permanent degradation of vast tracts of lands, a problem greatly magnified by developing mining technologies. If the land is not reclaimed in a manner that subjects it to further use, then the productivity of that land is lost to present as well as future generations, reducing the flow of other valuable items in interstate commerce. More important than the adverse economic effects on interstate commerce, however, are the *potential* costs in terms of stream pollution, floods, landslides, loss of fish and wildlife habitats, erosion of other lands, and hydrological imbalances that cumulatively have a substantial impact on interstate commerce. The courts have clearly recognized the impact of water pollution on interstate commerce. *United States* v. *Ashland Oil & Transportation Co.*, 504 F. 2d 1317, 1325 (6th Cir. 1974). *But see* note 1 *supra.*

Consequently, this court finds that Congress had a real and substantial rational basis for enacting the federal surface mining act to protect commerce and the national interest. Once a rational basis has been found, then congressional power is limited only by "express provisions in other parts of the Constitution." *North American* v. *S. E. C.*, 327 U.S. 686, 705 (1946).

III

THE TENTH AMENDMENT

Prior to *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the restraint that the Tenth Amendment placed on congressional action based upon the commerce clause was not clearly defined. The Supreme Court once described the Tenth Amendment as a "truism," placing no limitations on the commerce power. *United States* v. *Darby*, 312 U.S. 100, 124 (1941). This approach to the Tenth Amendment reached a high-water mark in *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), in which the Court found that the federal wage and hour law could be applied constitutionally to nonprofessional employees of state-operated schools and hospitals. Determining there to be commerce clause power, the Court found that Congress was not constitutionally required to "yield to state sovereignty in the performance of governmental functions." *Id.* at 195. According to the Court, "it is clear that the Federal Government, when acting within a delegated power, may override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character." *Id.* at 195. The Court signaled a retreat from this position, however, in *Fry* v. *United States*, 421 U.S. 542, 547 n. 7 (1975), stating that "[t]he Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function

effectively in a federal system," and in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the Court expressly overruled *Wirtz* and swept away nearly four decades of precedent.[4]

In *National League of Cities* the Court held that the minimum wage and overtime pay provisions of the Fair Labor Standards Act could not be applied to states and subdivisions of states. The fact that wages and hours of state employees were commerce or affected commerce was not questioned. The Tenth Amendment, however, was found to preclude the exercise of commerce power "in a fashion that would injure the States' 'ability to function effectively in a federal system.' " *Id.* at 852. In reaching that conclusion, the Court carefully distinguished the authority of Congress under the commerce clause to regulate "wholly private activity," from the authority to enact regulations that were "directed, not to private citizens, but to the States as States." *Id.* at 840, 845. According to the Court, the exercise of commerce power in the former is limited only by the requirement that " 'the means chosen by [Congress] must be reasonably adapted to the end permitted by the Constitution,' " *id.* at 840, citing *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241, 262 (1964), whereas its exercise in the latter is proscribed by the

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[4] *See* Beaird & Ellington, *A Commerce Power Seesaw: Balancing National League of Cities*, 11 Ga. L. Rev. 35 (1977); Michelman, *State's Rights and State's Roles: Permutations of "Sovereignty" in National League of Cities* v. *Usery*, 86 Yale L. J. 1165 (1977).

Tenth Amendment when matters "essential to [the States'] separate and independent existence" are involved.[5] *Id.* at 845. Applying the holding of *National League of Cities*, congressional action alleged to be in contravention of the Tenth Amendment must be scrutinized to determine whether the legislation is directed to the states as states and usurps an "integral governmental function."

The issue before the court, therefore, is whether the federal surface mining act is directed to the state as a sovereign entity, displacing its role as a decision-maker in areas of traditional governmental services, or whether the act is directed to private activity. While the act ultimately affects the coal mine operator, its pervasive effect is on the states' legislative authority and on state control of land within its boundaries. This point can best be illustrated by examination of the act itself. Congress finds initially that regulation of surface mining and reclamation is a primary governmental responsibility of the state, and regulations should rest with the state because of the differences in "terrain, climate, biologic, chemical and other physical conditions in areas subject to mining operations." Title I, § 101(f), 30 U.S.C. § 1201(f). Title V, however, then proceeds to establish mandatory standards that each state must adopt

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[5] Justice Blackmun's concurring opinion in *National League of Cities* indicates that Tenth Amendment restraints might not apply in environmental cases. 426 U.S. 856. This court is of the opinion that all constitutional restraints should be strictly construed except in a national emergency. None is shown to exist here.

if it desires to exercise its police powers to regulate land used for surface coal mining and to protect the personal and property rights of its citizens insofar as they may be adversely affected by surface coal mining. Title V, §§ 501-529, 30 U.S.C. §§ 1251-1279. The federal act allows the state to elect to have its own regulatory program instead of having federal regulation, but then mandates that the state law comply in complete detail with the federal law. The choice that is purportedly given is no choice at all.[6] If a state wishes to continue regulating surface mining activity, which Virginia had in the past,[7] it must conform to federal regulations.

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[6] Prior to *National League of Cities* congressional action directed to the states under the commerce power was held invalid under the Tenth Amendment if the states were "coerced" to establish a program enacted by Congress, but was valid if the states were merely "induced" to act. *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937). (Cardozo, J.); *Vermont* v. *Brinegar*, 379 F. Supp. 606 (D. Vt. 1974). Thus, congressional action was invalid if Congress attempted to "commandeer the regulatory powers of the state, along with their personnel and resources, for use in administering and enforcing a federal regulatory program," and "the states [were] to function merely as departments" of the federal government. *District of Columbia* v. *Train*, 521 F.2d 971 (D.C. Cir. 1975), *reinstated and modified sub nom. District of Columbia* v. *Costle*, 567 F.2d 1091 (D.C. Cir. 1977). The induced-coerced distinction can still be used to determine the validity of legislation affecting nontraditional governmental functions.

[7] The production of coal by surface mining in Virginia is of relatively recent origin; while some states have surface mined coal for over 100 years, Virginia did not commence surface mining until the early 1950's and no significant large produc-

The power to adopt and enforce laws affecting the use of private, nonfederal land has traditionally and historically been within the police powers of the respective states. *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974); *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926). The Court in *National League of Cities* does not enumerate all the activities that constitute "traditional government functions," 426 U.S. at 851 n. 16, although it does mention "fire prevention, police protection, sanitation, public health, and parks and recreation" as examples. State regulation of land use is in a different category than these activities, not being a service per se; however, the court feels that it also "provides an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens." 426 U.S. at 855. A state is its citizens and protection of their land is as vital an activity as any of the other enumerated services.[8]

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tion occurred until the 1960's. The Legislature passed significant surface mining legislation in 1966. Va. Code §§ 45.1-01 to -225 (Repl. Vol. 1974). This legislation was amended and improved up until the passage of the federal act.

Prior to the commencement of the trial of this case, the Virginia Legislature passed the Virginia Coal Surface Mining Control and Reclamation Act of 1979 in order to establish the state regulatory program called for under the federal act. It corresponds with the federal act with respect to performance standards; the enforcement provisions are in substantial conformity with the federal act. Va. Code §45.1-226 to -270 (Cum. Supp. 1979).

[8] The Court comments that there is a major difference in Congress' ability to regulate "individual businesses neces-

The Court in *National League of Cities* speaks of the unconstitutional displacement of state power occurring when the state no longer has the ability to make "essential decisions." 426 U.S. at 855. Since *National League of Cities*, it has been held that the Tenth Amendment is not infringed if "the states retain broad discretion under the regulations to control the use of their land in the scope of their economic development." *Sierra Club* v. *Environmental Protection Agency*, 540 F. 2d 1114, 1140 (D.C. Cir. 1976). The evidence presented to this court clearly shows that the Commonwealth of Virginia does not retain broad discretion under the regulatory scheme devised by Congress to control economic development of the land in southwest Virginia, nor does it retain the power to make choices as to essential decisions regarding that land. The provision requiring return to "approximate original contour" for all operations, regardless of the conditions, is the most intrusive

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sarily subject to the dual sovereignty of the government of the Nation and of the state in which they reside" and congressional authority to regulate the state acting as a state. 426 U.S. at 851. Professor Tribe notes "it seems anomalous to hold that Congress retains its preemptory power to displace state regulation of private conduct but is restrained when it attempts to control decisions affecting the state's own service-providing employees." Tribe, *American Constitutional Law* 312 (1978). He then reasons, however, that the language of *National League of Cities* is "consistent with a protected state role premised on individual rights." *Id.*

practical aspect of the act.[9] Title 30 U.S.C. § 1265 (d)(2) requires that steep slopes shall be reclaimed by "[c]omplete back-filling with spoil material . . . to cover completely the highwall and return the site to the appropriate [sic] original contour. . . ." Virginia is particularly affected by this legislation because ninety-five percent of its strippable reserves are located on slopes in excess of twenty degrees and, therefore, the "approximate original contour" provisions come into play with regard to almost all of the state's coal reserves.

In enforcing this requirement, the state has lost control over the economic development that could take place in southwest Virginia. The Commonwealth is deprived of its right to dictate whether this land could be better used for some other purpose. The facts show there is a great need for level land in the seven counties that comprise the coal fields of Vir-

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[9] A variance from the original contour is allowed by § 515(e), 30 U.S.C. § 1265(e). *See* note 14 *infra*. At the time of trial and briefing, § 515(e) was considered to be part of the permanent program rather than the interim program. The Office of Surface Mining has since changed its position on this matter and has published proposed rules for interim program variances. 44 Fed. Reg. 61312-61314 (Oct. 24, 1979).

In comments to those proposed rules, the government notes that the variance is conditioned upon "complete backfilling with spoil material . . . to cover completely the highwall," 30 U.S.C. § 1265(e)(1), which requirement "will limit the usefulness of the variance in very steep slopes" and "may make the variance of little use in certain instances." 44 Fed. Reg. 61313 (Oct. 24, 1979). For all practical purposes, the backfilling stipulation destroys the usefulness of a variance since the highwall must still be covered.

ginia. Some of the uses that strip mined land has previously been put to, and which would be within the state's interest to continue, include construction of schools, airports, industries, recreation areas, and shopping centers on the leveled land. In addition to these uses, agricultural advantage was taken of strip mined land. In many instances, leveled land was sown with grain and grazed by cattle or sheep. The federal law does not provide a variance for agricultural use on steep slopes.[10]

In addition to preventing forward-looking land use planning, the reclamation provisions adversely affect land values. Before coal land in southwest Virginia is stripped, up until the trial in this suit, it was worth five dollars to seventy-five dollars an acre. After being leveled, land is worth a minimum of five thousand dollars an acre and may bring as much as three hundred thousand dollars an acre or one thousand to five thousand dollars a front foot. If land is restored to its original contour, its worth reverts to the lower values.

The facts also show that returning a steep slope area to original contour after it has been surface mined is economically infeasible and physically impossible. The cost of production of coal is increased up to seventy percent. On occasion the economic im-

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[10] *See* Proposed Rules, 44 Fed. Reg. 61313 (Oct. 24, 1979). Section 515(c)(3) does provide for an agricultural variance when the mining operation involves mountain-top removal. The evidence presented to this court indicates that this method is not available to coal mining operators in southwest Virginia. *See* note 14 *infra*.

practicality of strip mining coal is outweighed by physical realities; equipment may not be available to cover the highwall on a steep slope to restore the original contour. These effects aggregate to undermine the Commonwealth's economy: coal companies have gone out of business, between five hundred and one thousand coal miners have lost their jobs; income from surface mining permits has decreased; the coal-based revenues that the counties rely on to operate have been reduced. Most of the high schools built in recent years in these counties were financed through the coal severance tax. The production of coal is a two-billion dollar business in Virginia, contributing substantially to its economy. While the production is confined to the seven counties in Virginia's most western tip, it also affects many other counties when coal is transported to the port of Norfolk via the Norfolk and Western and Chesapeake and Ohio Railroads. These railroads employ ten thousand people in coal related activities in the Hampton Roads area alone.

Besides having been forced to spend 1.5 million dollars to meet the mandates of the federal law, the state has been deprived of its choice as to how best to protect Virginia's environment. The undisputed testimony in this case shows that the Commonwealth was completely shut out of the input process for drafting the interim regulations or the permanent program. Virginia recommended that the legislation should take into consideration the particular problems that existed in the coal industry due to terrain, as

Congress had recognized was appropriate. The state is now in the position of enforcing an act so particularly unsuited to its terrain that compliance with its provisions has a higher potential for environmental harm than alternative procedures.[11] A return to approximate original contour on a steep slope increases sedimentation because of the increased erosion from the unstable mass. In addition, a dangerous condition may be created by backfilling the bench. When overburden material is stacked up against the highwall, the normal process of settlement of the fill material tends to pull it away from the highwall. This provides a natural channel for water from the upper slope to flow down to the bench below and saturate the underlying material, creating an unstable mass with a likelihood of eventual collapse.

After having synthesized the cumulative effects of the evidence presented, the court finds that the Surface Mining Control and Reclamation Act of 1977 operates to "displace the States' freedom to structure integral operations in areas of traditional govern-

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[11] The federal government itself sponsored studies that showed this to be the case. *See* Glover, *Digesting the Strip Mining Act*, Kentucky Bench & Bar 25-29 (Jan. 1978), *citing Erosion and Sediment Control, Surface Mining in Eastern U.S.*, U.S. Environment Protection Agency: October 1976, prepared under contract by Hipman Associates, Inc., Columbia, Maryland; *Evaluation of Current Surface Coal Mining Overburden Handling Techniques and Reclamation Practices, Phase III: Eastern U.S.*, U.S. Dept. of Interior, Bureau of Mines, July 1976, prepared under contract by Mathtech, a division of Mathematica, and Ford, Bacon & Davis Utah, Inc., a subsidiary of Ford, Bacon & Davis.

mental functions," *National League of Cities*, 426 U.S. at 852, and, therefore, is in contravention of the Tenth Amendment. As in *National League of Cities*, 426 U.S. at 846-51, the plaintiffs have shown that there is a significant impact on the governmental bodies involved: through forced relinquishment of state control of land use planning; through loss of state control of its economy; and through economic harm, from the expenditure of state funds to implement the act and from destruction of the taxing power of certain counties, cities, and towns. The act has "substantially restructure[d] traditional ways in which the local governments have arranged their affairs." *National League of Cities*, 426 U.S. at 849.

In considering the relief to be granted in a case like this, the state and federal government's interests must be balanced.[12] The approximate original contour requirement imposed by the act is not environmentally sound and does not serve the conservation interests of the federal government. No harm will be visited upon the federal government nor to the environment to permanently enjoin this provision of the act. On the other side, this provision and the postmining land use restrictions drastically affect the economy of the Commonwealth of Virginia, making it economically and physically impossible to mine coal, and prevent the state from using its land for agricultural purposes, for construction of airports, schools,

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[12] Justice Blackmun suggests that this is what the majority has actually done in *National League of Cities*, 426 U.S. at 856.

hospitals, and for other activities. By recognizing these facts in granting relief, the preemptive power of the federal government through the commerce clause is recognized and the rights of the Commonwealth of Virginia as set out in the Tenth Amendment are preserved.

The other provisions of the act that infringe upon traditional governmental functions, however, such as the regulation of graveyards, control of blasting, and establishment of sediment ponds, while offensive, are not so burdensome to the state as to threaten its economy or affect its land use planning functions, and will not be enjoined.

For the reasons stated above, § 515(d) and (e) of the act, 30 U.S.C. § 1265(d), (e), is hereby enjoined.

IV. EQUAL PROTECTION AND SUBSTANTIVE DUE PROCESS GUARANTEES

It is asserted that the act violates Fifth Amendment equal protection guarantees because of its disproportionate economic effect on southwest Virginia, and that it is arbitrary and irrational in violation of substantive due process. First of all, it must be observed that almost any form of economic regulation will affect some persons or interests more harshly than others. In any event, it is incorrect to assume that southwest Virginia bears the entire burden of the act. While, for example, the steep slope provisions of the act, 30 U.S.C. § 1265(d), are undoubt-

edly burdensome to southwest Virginia interests, the act's stringent revegetation provisions also burden surface mine interests in Western arid lands. *See* 30 U.S.C. § 1265(b)(20). The fact that certain interests or persons are affected more than others does not render economic legislation unconstitutional. "[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." [13] *United States* v. *Carolene Products Co.*, 304 U.S. 114, 152 (1938). *See Duke Power Co.* v. *Carolina Environmental Study Group, supra,* at 83; *New Orleans* v. *Duke's,* 427 U.S. 297, 306 (1976). On this basis, the court is unable to find that the act contravenes equal protection or substantive due process.

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[13] The Supreme Court has made clear that certain decisions are best left to the Congress:

> The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. Thus, we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.

Secretary of State v. *Bradley,* 440 U.S. 93, 97 (1979).

THE FIFTH AMENDMENT

The private plaintiffs in this case contend that § 515, 30 U.S.C. § 1265, is unconstitutional because its requirement to return steep slopes to their approximate original contour[14] prohibits them from

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[14] The reclamation provisions about which plaintiffs complain are set forth in § 515, 30 U.S.C. § 1265, the substantive heart of the act. The pertinent implementing regulations are found in 30 C.F.R. §§ 715.11-716.7. Section 515(b), U.S.C. § 1265(b), prescribes general standards applicable to all coal surface mining operations. Under those general standards operators must restore the land to a condition capable of supporting uses it could support prior to mining, *id.* § 1265(b)(2); restore the land to its approximate original contour with all highwalls eliminated, *id.* § 1265(b)(3); insure that reclamation occurs simultaneously and in an environmentally sound manner, *id.* § 1265(b)(16); be responsible for revegetation, *id.* § 1265(b)(20), abide by stringent standards for the segregation of spoil from topsoil or the best available subsoil, and the placement of excess spoil, *id.* § 1265(b)(5), (6), (7), (22); meet stringent standards for the construction and location of impoundments, *id.* § 1265(b)(8); minimize disturbances to the hydrological balance at the mine site and associated offsite areas by avoiding toxic drainage, preventing offsite flows of suspended solids, and by restoring the recharge capabilities of the mined area, *id.* § 1265(b)(10); meet certain standards for disposal of mine wastes, *id.* § 1265(b)(11), and comply with specific standards for various matters such as the establishment of access roads and the use of explosives, *id.* § 1265(b)(15), (17).

Additional performance standards are set forth for mountaintop remove and "steep slope" mining. In the case of mountaintop removal there is an important, but limited, exception for the requirement that land be returned to its approximate original contour: a variance is allowed when the operator demonstrates that a higher use is both feasible and planned. *Id.* § 1265(c). The alternative methods of surface mining that are provided in the act, mountaintop removal

mining coal on their own land, and, therefore, their properties have been taken without due process and just compensation. They also complain that § 522 of the act, 30 U.S.C. § 1272, is unconstitutional for the same reason.

This court has found; as stated in Part III of this opinion, that ninety-five percent of the strippable coal lands in Virginia are located on slopes in excess of twenty degrees, that if the land is surface mined it must be restored to its approximate original contour under § 515, 30 U.S.C. § 1265, that it is economically and physically impossible to restore these steep slopes to approximate original contour, and,

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and "block cut" method, are not feasible in the steep mountain area of Virginia because the land holding pattern consists of small parcels of usually less than one hundred acres.

For purposes of the additional standards applicable to steep slope mining, a "steep slope" is defined as "any slope above twenty degrees or such lesser slope as may be defined by the regulatory authority after consideration of soil, climate, and other characteristics of a region or state." *Id.* § 1265(d)(4). When mining on such slopes, spoil or waste materials may not be placed downslope below the bench or mining cut; the operator may not disturb the land above the top or highwall unless it is found that such disturbance will facilitate compliance with the act's environmental protection standards; and complete backfilling with spoil material is required to "cover completely the highwall . . . ." *Id.* § 1265(d). A variance is allowed if the owner of the property so requests in writing, the watershed control of the area is improved, the potential use of the affected land is deemed to constitute an equal or better economic or public use, and it is designed and certified by a qualified registered professional engineer in conformance with professional standards established to assure the stability, drainage, and configuration necessary for the intended use of the site. *Id.* § 1265(e). *But see* note 9 *supra.*

therefore, that it is physically and economically impossible to mine the coal. While current regulations provide for variances, they are meaningless due to the language of the act. *See* note 9 *supra*. Even if the coal could be removed and the land restored to approximate original contour, the court finds that its value has been diminished to practically nothing. It has nominal market value, worth from five dollars to seventy-five dollars per acre; whereas, if it were left leveled or stabilized with benches, with roads already constructed, it would be worth from five thousand dollars to three hundred thousand dollars per acre.

The other provision complained of, § 522 of the act, 30 U.S.C. § 1272, expressly prohibits mining near a road, public building, school, church, public park, community building, or cemetery, and other place the state might designate.

While a taking normally occurs as the result of formal condemnation proceedings, substantial burdensome interference by the government with a property owner's use of his property may amount to a constructive taking that must be compensated under the Fifth Amendment. This principle was first clearly enunciated in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922). In that case the defendant coal company deeded away surface rights to land containing coal deposits. Several years later Pennsylvania passed a law prohibiting the mining of coal that would cause a subsidence of any structure used for human

habitation. Relying on the state act, plaintiffs, owners of the surface rights, sought to restrain the defendant's mining activities. Speaking for the Court, Mr. Justice Holmes states that "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415. He noted, however, that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Id.* at 413. That is, "some values are enjoyed under an implied limitation and must yield to the police power." *Id.* at 413. According to Justice Holmes, this rationale has limits that may be ascertained, in part, by considering "the extent of the diminution." *Id.* at 413. Once the diminution "reaches a certain magnitude, in most if not all cases, there must be an exercise of eminent domain and compensation . . . ." *Id.* at 413. Under the facts at hand, it was concluded that a compensable taking had occurred:

> "For practical purposes, the right to coal consists in the right to mine it." [Citation omitted.] What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. This we think that we are warranted in assuming that the statute does.

Id. at 414-15.

In the next major case to challenge a regulation as a taking, the Court shifted its emphasis from the magnitude of the diminution to the public purpose being served, and balanced the interests. *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 (1962). In *Goldblatt* the owner of a sand and gravel concern was forced to discontinue operation due to an ordinance banning excavation below the water table. The Court announced that the regulation was to be judged in terms of its reasonableness and that evaluation of its reasonableness depended upon ". . . such things as the nature of the menace against which it will protect, the availability and effectiveness of other less drastic protective steps, and the loss which appellants will suffer from the imposition of the ordinance." *Id.* at 595. Finding no evidence that "even remotely suggest[ed] that [the] prohibition of further mining [would] reduce the value of the lot in question," the ordinance was upheld. 369 U.S. at 594.

In *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104, 124 (1978), the Court again addressed the question of when a taking occurs, observing that it quite simply, "has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injury caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." This recent decision involved a New York City law that provided no exterior changes could be made on a landmark without the advance approval of the New York City Landmarks Preserva-

tion Commission. Property owned by plaintiff, the Grand Central Terminal, was designated a landmark by the Commission in 1967. Plaintiff did not challenge the designation but sought permission in 1968 to construct a fifty-five story office building atop the terminal. Being denied permission, plaintiff brought an action maintaining that his property had been taken in violation of the Fifth Amendment. The Court held that the law constituted a legitimate exercise of the police power and that a property owner whose land is designated a landmark is not entitled to compensation, even though he may suffer substantial losses as a consequence, if he can still obtain a "reasonable return" on his property. In reaching that result, the Court found that the designation of Grand Central Station as a landmark did not interfere with the present use of the terminal; that future uses of the air space were not prohibited, and, most importantly, that New York City provided a means for compensation through its transferable rights program.

The latest Supreme Court pronouncements on taking by regulation emphasize the need for the "exercise of judgment," *Andrus* v. *Allard*, 48 U.S.L.W. 4013, 4017 (Nov. 27, 1979), and for "ad hoc, factual inquiries," *Kaiser Aetna* v. *United States*, 48 U.S. L.W. 4045, 4048 (Dec. 4, 1979). The Court in *Kaiser Aetna* pinpoints several factors that have particular significance in the taking analysis: "the economic impact of the regulation, its interference with reasonable investment backed expectations and the character of the governmental action." *Id.* That

case arose from governmental action declaring that the owners and lessees of a private pond must allow public access to the pond after they had had a channel dredged from it to the bay. The government argued that the pond had become a navigable water, and therefore, the government had regulatory power over it under the commerce clause. The Court, while noting that Congress could assure public access to the pond if it chose to do so under the broad powers granted by the commerce clause, makes clear that the taking issue is an entirely separate question from the ability to enact a statute or regulation. The Court then held that the government's action will result in a taking, being an "actual physical invasion of the privately owned marina," rather than amounting to only an "insubstantial devaluation of . . . private property." The Court was led to this conclusion by the fact that the dredging of the channel had been done with the consent of the government. The Court reasoned that this led to the parties' expectation that the property would remain private and that the government would have to exercise its power of eminent domain if they desired to take over the property.

The other case mentioned above, *Andrus* v. *Allard*, was before the Court to determine, among other issues, whether regulations enacted by the Secretary of the Interior under the Eagle Protection Act and the Migratory Bird Treaty Act effectuated a taking without just compensation in violation of the Fifth Amendment. The district court had previously held that the regulations did cause a violation of the

property owner's Fifth Amendment rights because the owners were deprived of the opportunity to earn a profit. The Supreme Court reversed the lower court, holding that the simple prohibition of the sale of property without any physical property restrictions does not constitute a taking in violation of the Constitution. The Court emphasized that the property owners had not lost the ability to derive any economic benefit from the artifacts, only the most profitable use; the "loss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a taking claim." 48 U.S.L.W. at 4017.

Neither *Penn Central*, *Kaiser Aetna*, nor *Allard* overrules *Pennsylvania Coal Co.* v. *Mahon*, *supra*. The Court, however, has shifted its emphasis from describing *Pennsylvania Coal Co.* as a matter of commercial impracticality with "nearly the same effect as the complete destruction" of the leased property rights, *Penn Central*, 438 U.S. at 127, to describing it as "the loss of profit opportunity . . . accompanied by a physical restriction against the removal of coal." *Allard*, 48 U. S. L. W. 4017 n. 22. While the Court has said "a reduction in value of property is not necessarily equated with a taking," *Allard*, 48 U. S. L. W. at 4017, *citing Goldblatt* v. *Hempstead*, 369 U.S. 590, 594 (1962), *and Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915), Justice Holmes in writing the Court's opinion in *Pennsylvania Coal Co.* v. *Mahon*, *supra*, made no such contention. Speaking for the Court, he indicated that the extent of the diminution

is one factor for consideration, and the magnitude of the diminution is the dominant factor in most cases. *Pennsylvania Coal Co.* is still good law today; an examination of the cases that have been decided since and before then reveals that the extent of the diminution has always been a decisive factor in whether a taking has occurred, if not the most decisive factor.

In *Hadacheck* v. *Los Angeles*, 239 U.S. 394 (1915), an ordinance prohibiting the manufacture of bricks was held not to be a taking under the Fifth Amendment because there was "no prohibition of the removal of the brick clay; only a prohibition within the designated locality of its manufacture into bricks." 269 U.S. at 412. The Court reserved opinion as to its decision if the clay could not be removed. *United States* v. *Cress*, 243 U.S. 316 (1917) involved government action rather than regulation. The federal government, by lock and dam, raised the water of a stream above its natural level so that lands on a nonnavigable tributary periodically overflowed, injuring but not destroying the value of privately owned land. The Court held

> [t]here is no difference of kind, but only of degree, between a permanent condition of continual overflow by back-water and a permanent liability to intermittent but inevitably recurring overflows; and, on principle, the right to compensation must arise in the one case as in the other. If any substantial enjoyment of the land still remains to the owner, it may be treated as a partial instead of a total divesting of his property in the land.

243 U.S. at 328. Thus, even if only one-half of the value of the land is impaired, it is a taking under the Fifth Amendment, "so long as the damage is substantial." *Id.* at 328. The Court therein emphasized the character of the invasion, not the amount of damages resulting from it. Likewise, in *United States* v. *Causby*, 328 U.S. 256 (1946), the Court states that the question of whether a taking has occurred is the determination that the damages are "substantial" rather than "consequential". 328 U.S. at 266. Excessive noise of military aircraft flying over claimants' property, destroying the use of the property as a chicken farm, was held to be a taking of private property for public use.

In analyzing the cases discussed in detail above, the same conclusion can be drawn as to the importance of the diminution factor. *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 (1962), never reached the question of "[h]ow far regulation may go before it becomes a taking . . . ., for there is no evidence in the present record which even remotely suggests that prohibition of further mining will reduce the value of the lot in question." 369 U.S. at 594. In *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978), the Court, in finding that a Fifth Amendment taking had not occurred, considered the "magnitude" of the "interference" and the "severity of the impact." It ultimately came to the conclusion that the intereference with plaintiff's property was not of such

magnitude as to constitute a taking.[15] In *Andrus* v. *Allard*, 48 U.S.L.W. 4013, 4017 (Nov. 27, 1979), the Court considered the extent of the diminution that had resulted from legislation that prohibited the sale of Indian artifacts containing feathers of birds legally killed. It found that a prediction of profitability is a matter of speculation, and further, that there was no proof that an economic benefit was not available to the owners by exhibiting the artifacts rather than selling them. Loss of one strand of the bundle of property rights does not constitute a taking. Again, in *Kaiser Aetna*, 48 U.S.L.W. 4045 (Dec. 4, 1979), the Court found that the government regulation did not cause "an insubstantial devaluation of petitioner's private property," rather it resulted in "an actual physical invasion of the privately owned marina."

There are those in every generation who believe that private property should be taken without compensation whenever it is for the public good as conceived by them. This generation is no exception and

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[15] It is interesting to note that the Court in its opinions in *Goldblatt* and *Penn Central* misinterpret the holding in *Hadacheck*. In *Goldblatt*, 369 U.S. at 594, the Court says that *Hadacheck* upheld a diminution of $800,000 to $60,000 and in *Penn Central*, 438 U.S. at 131, *Hadacheck* is described as a case in which an "87½% diminution in value" did not, standing alone, constitute a taking. The Court in *Hadacheck* never actually held that there had been a diminution in the value of the property. The plaintiff had simply alleged such a loss. The holding was that the ordinance did not prohibit the removal of clay, only its manufacture into bricks. 230 U.S. at 412. The Court reserved opinion on other questions that might have arisen if the ordinance had been broader. *Id.*

exponents of this belief fill the halls of Congress and the bureaucracy and infiltrate the courts. The right of a person to own land and the protection of that right were sacred tenets of the common law; and it is no less sacred today as the population booms. We are aware that God only created so much land; that each parcel is considered unique; therefore, as the desire for land increases and the parcels of ownership become smaller and smaller the importance of the Fifth Amendment increases rather than diminishes. Today the words of Justice Holmes in *Pennsylvania Coal Co.* v. *Mahon* are even more meaningful than when written almost sixty years ago. They deserve to be chiseled in stone and read by each generation:

> The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

260 U.S. at 415.

Unfortunately, Justice Holmes was wrong because more and more the Fifth Amendment ban on taking any private property without compensation is ignored by men in accordance with their philosophies or whims. In 1979, a unanimous Supreme Court said

that "[t]here is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate. Formulas and factors have been developed in a variety of settings. Resolution of each case, however, ultimately calls as much for the exercise of judgment as for application of logic." *Allard*, 48 U.S.L.W. at 4017.

This same Supreme Court, however, in the same case, cites *Pennsylvania Coal Co.* v. *Mahon* with approval five times. Therefore, while it is free to "exercise its judgment", this court feels bound by precedent. In the case now before this court the facts are on all fours with *Pennsylvania Coal Co.* v. *Mahon.* This is not a type of case involving "an average reciprocity of advantage," 260 U.S. at 415, which has been recognized as a justification for zoning and other laws. This is a case in which the Surface Mining Act must be viewed in a practical sense, for it involves more than just a large diminution of land value, more than commercial impracticality. In Virginia the evidence shows that surface landowners are possessed of small tracts usually less than one hundred acres. The requirement of return to approximate original contour amounts to a physical restriction on the removal of coal. The landowner cannot remove his coal because it is economically and physically impossible to comply with the steep slope reclamation provisions of the act.[16] Because of the nature of the land, the owner is

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[16] This conclusion is aided by the nature of the government regulations. It has been shown by the government's own studies, *see* note 11 supra, that a return to approxi-

thereby deprived of any use of his land, not only the most profitable use. Mountainous terrain is unusable for all income producing activities unless it is level, which the act is aimed at preventing. Therefore, § 515(d) and (e), 30 U.S.C. § 1265(d), (e), and any other provision of § 515, 30 U.S.C. § 1265, or any other provision of the act that requires a surface mine operator of steep slopes to restore the land to approximate original contour, is declared to be a taking of said land under the Fifth Amendment and is hereby adjudged to be unconstitutional.

In addition, some portions of the act clearly prevent a person from mining his own land or having it mined. See, for instance, § 522 of the act, 30 U.S.C. § 1272, which expressly prohibits mining within one hundred feet of the outside right of way of any public road, within three hundred feet of any occupied dwelling or any public building, school, church, community

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mate original contour on steep slopes is environmentally unsound and may create dangerous conditions. The fact that property owners are being deprived of the use of their land by a statute that does not accomplish its purpose, nay, may even run contrary to it, tips the balance toward finding a taking. Similarly, the destruction of the owners' expectations that they would be able to mine the land they had acquired for the extraction of coal would not, in and of itself, rise to the level of compensable taking. *See, e.g., Goldblatt* v. *Hempstead, supra; Hadacheck* v. *Sebastian, supra.* This case can be distinguished from those cases, in which the Supreme Court prohibited the continuation of businesses that had been in operation for some time in order to comply with ordinances enacted for the public good. Although Congress enacted the surface mining act for the public good, its operation in Virginia does not accomplish that purpose in some instances.

or instutional building, or public park, or within one hundred feet of a cemetery, and requires the states to designate land areas unsuitable for mining. This statute is clearly a physical restriction against the removal of coal, and furthermore, requires a total loss of profit opportunity; and therefore, § 522 of the act, 30 U.S.C. § 1272, is hereby adjudged to be unconstitutional until such time as the government sees fit to obtain said land by eminent domain and payment of just compensation. *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1923); *Andrus* v. *Allard*, 48 U.S.L.W. 4013 (Nov. 27, 1979).

Although Congress may have the power to prohibit surface mining, it may not do so, after plaintiffs and others have acquired land to mine coal, without invoking its eminent domain power and paying just compensation. *See Kaiser Aetna* v. *United States*, 48 U.S.L.W. 4045, 4048 (Dec. 4, 1979). In fashioning appropriate relief, the court can enter a declaratory judgment, *Duke Power Co.* v. *Carolina Environmental Transportation Co.*, 438 U.S. 59 (1978). Therefore, a declaratory judgment will be entered in accordance with the opinions expressed herein.

VI

PROCEDURAL DUE PROCESS

Plaintiffs contend that the authority given to the Office of Surface Mining inspectors to issue cessation orders [17] without a prior hearing or showing of proper

[17] The enforcement provision of the act, 30 U.S.C. § 1271, provides that the Secretary shall notify the state regulatory authority, if one exists, of the alleged violation. If there

cause is an arbitrary abuse of power and, therefore, a denial of due process of law under the Fifth Amendment of the United States Constitution. Plaintiffs further contend the issuance of violation notices and assessments of civil penalties have the same practical effect as cessation orders and also amount to a violation of procedural due process.[18]

The facts presented to this court concerning the design and enforcement of cessation orders and violation notices indicate that plaintiffs' due process claims are well substantiated. Coal mine operators

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is no such state authority or if the state fails to take action within ten days of notification of the violation, then the Secretary orders federal inspection. The ten-day notification period is waived if there is adequate proof that "imminent danger of significant environmental harm exists" and the state has failed to take "appropriate action." 30 U.S.C. § 1271(a)(1).

Although the federal act contemplates that the state will become the primary regulatory agent, the federal government continues to monitor the state. This has resulted in a duplication of effort; the federal and state inspectors work side by side enforcing the same law. As indicated above, if the state does not enforce the regulations to the satisfaction of the Secretary, then the federal government can step in at any time and enforce the regulations.

[18] The issue has been raised whether warrants are required in all instances before surface coal mining operations are inspected. The court will not rule on this issue; however, the court does find that the surface coal: mining industry is not a pervasively regulated industry because the present act is the first attempt by Congress to regulate the surface mining industry. This court is not in agreement with the findings to the contrary by the District Court of the District of Columbia in *In re Surface Mining Regulation Litigation*, 456 F. Supp. 1301, 1318-19 (D.D.C. 1978).

are subject to cessation orders being issued for conditions that are later determined not to be in violation of the act. Irreparable harm frequently results to the operators from the unnecessary cessation of coal productions. This unfortunate situation is caused in part by the flexibility given in the act and regulations to mine inspectors to issue cessation orders and in part by the lack of an opportunity for the mine operator to be heard on the alleged violation in advance of the cessation order because of the economic injury that may result in continuing operation while being penalized for an alleged violation involving that operation.

The authority to issue cessation orders is granted by § 521(a)(2) and (3), 30 U.S.C. § 1271(a)(2), (3). The standard for issuance under § 521(a)(2) is the determination by an Office of Surface Mining [OSM] inspector that there is "imminent danger to the health or safety of the public" or "significant, imminent environmental harm to land, air, or water resources." Total or partial cessation of mining operations may be ordered. In addition, § 521(a)(3) provides that a cessation order can be issued if an operator has not abated a violation within the period allowed. The inspector must make a written finding of the failure to abate and the cessation order must be for "good cause shown." 30 U.S.C. § 1271(a)(3).

Once a cessation order has been issued, the mine operator has administrative remedies he can pursue under the act to test the validity and necessity of the order. The formal review procedure calls for the operator's application to the Secretary within thirty

days of receipt for review of the cessation order or violation notice. § 525(a), 30 U.S.C. § 1275(a). The Secretary then has thirty days in which to conduct a hearing and issue a written decision. The hearing is subject to the provisions of 5 U.S.C. § 554 and is conducted by an administrative law judge under the current regulations. The maximum sixty-day period for full adjudication has been held by one court not to be unreasonable. *In re Surface Mining Regulation Litigation*, 456 F. Supp. 1301, 1322 n. 25 (1978) [hereinafter cited as *In re Surface Mining*]. Judicial review of the decision in federal district court is provided by § 526(a)(2), (b), 30 U.S.C. § 1276(a)(2), (b), within thirty days. De novo review by a court or jury is not permitted, nor can the court weigh the evidence. The findings of the Secretary "if supported by substantial evidence on the record considered as a whole," are conclusive. § 526(b), 30 U.S.C. § 1276(b).

An informal review of cessation orders is necessitated under § 521(a)(5), which provides that a cessation order expires after thirty days if a public hearing has not been held at or near the minesite. The statute does not require the hearing to be held under 5 U.S.C. § 554, and the Secretary's interpretation of the provision as requiring only an informal hearing has been upheld as "not arbitrary, capricious, or inconsistent with law." *In re Surface Mining*, 456 F. Supp. at 1323. The regulations currently require that the OSM issue a written decision within fifteen days of the hearing. 30 C.F.R. § 722.15 (1978).

Temporary relief from a cessation order or violation notice may be petitioned for from the Secretary before the formal review of § 525 is completed. § 525(c), 30 U.S.C. § 1275(c). The Secretary must render a decision granting or denying the relief within five days in the case of a cessation order and "expeditiously" in the case of a violation notice. In order for relief to be granted, a hearing must be held, but if relief is denied then a hearing is not required. Judicial review of this decision regarding any cessation order issued under § 521(a)(2) or (3), 30 U.S.C. § 1271(a)(2), (3), is provided by § 526(c), 30 U.S.C. § 1276(c). The court may grant such temporary relief as it deems appropriate.

The United States District Court for the District of Columbia has previously held that the act's design for issuance of cessation orders and post-cessation hearings, discussed above, was well drawn and in compliance with the due process clause of the Fifth Amendment to the United States Constitution. *In re Surface Mining*, 456 F. Supp. 1301. The federal defendants have argued that the Commonwealth of Virginia and the Virginia Surface Mining and Reclamation Association are barred from relitigating the same issues as decided in that case because they were parties to the prior suit. The two plaintiffs are not barred from participating in this suit, however, for a number of reasons. The issues in dispute are not the same: plaintiffs in the District of Columbia suit were primarily attacking the constitutionality of certain regulations issued by the Secretary; the court ruled

on the due process question as it related to the way the act was designed. In the court's opinion the standards drawn by Congress for issuance of cessation orders were "sufficiently specific to strictly control governmental action in order to reduce the risk of an erroneous deprivation." 456 F. Supp. at 1321. The question before this court is whether, in the application of the act, the plaintiffs' due process guarantees have been violated. The District of Columbia court indicated at one point that it would be inappropriate for it to rule on the constitutionality of certain regulations until they had been applied. 456 F. Supp. at 1313. In addition, the court did not rule on some parts of the act at all, for example, the question of due process guarantees for the imposition of civil penalties. In considering whether § 521(a)(3) was unconstitutional, the court mistakenly assumed that the section only provided for the issuance of violation notices and not for cessation orders. 456 U.S. at 1319 n. 18. This court also cannot bar plaintiffs from litigating the claims brought up in this suit because it is unclear from the *In re Surface Mining* opinion whether these are the same claims as were disputed therein. Because the court's decision upholds the constitutionality of cessation orders and their review procedures, however, it is necessary that this court analyze what the District of Columbia court actually held, factors that have arisen since then that affect the determination, and points on which this court is in disagreement.

The District of Columbia court was led to the conclusion that the Fifth Amendment was not violated by the following logic: (1) summary administrative action prior to a hearing has been upheld by the Supreme Court in those situations in which it is necessary to protect an important governmental interest, and the governmental interest in this case is similar to those interests that have been held to warrant deprivations prior to a hearing; (2) the use of cessation orders is limited to circumstances in which there is a need for prompt action; and (3) the act provides adequate opportunity for a mine operator subject to a cessation order to be heard. This court must respectfully disagree with some of these conclusions made by our brother in the District of Columbia for the following reasons:

The court in *In re Surface Mining* cites a string of cases in support of the proposition that summary administrative action has been upheld to protect a significant governmental interest. 456 F. Supp. at 1319, *citing Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) (seizure of rental yacht carrying marijuana); *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950) (seizure of mislabeled vitamin product); *Bowles* v. *Willingham*, 321 U.S. 503 (1944) (rent control orders); *Phillips* v. *Commissioner of Internal Revenue*, 283 U.S. 589 (1931) (collection of federal revenue); *Central Union Trust Co.* v. *Garvan*, 254 U.S. 554 (1921) (seizure of enemy property); *North American Cold Storage Co.* v. *Chicago*, 211 U.S. 306 (1908) (seizure of con-

taminated food). In citing those cases, the court does not point out the difference in the nature of the injury that could result to the affected party from operation of the summary action. While the governmental interest may be very high in protecting the environment and the public, most situations do not demand the immediate cessation of mining in order to achieve this goal.[19] There is a great deal of difference in shutting down a business from seizing a yacht, vitamin products, contaminated food, and the like. These are not situations in which entire businesses will be forced to discontinue operations. If a coal mine is shut down by a cessation order, the coal miners will be unemployed. Furthermore, the coal mine employing as few as five people will be using equipment worth at least half a million dollars in order to carry on a strip mine operation. Most of these mine operators operate on a credit basis and have to make monthly payments on heavy equipment. If a mine is closed down, the equipment may be subject to repossession for failure to meet the monthly payment. A cessation order may result in the operator going out of business even if found innocent, because the

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[19] Evidence was heard by this court of one case in which serious environmental harm was involved. Impoundment at a deep mine operation had created black water in the Powell River, causing the death of a great many fish. Even though federal and state inspectors were aware of the situation and the damage it had already caused, no cessation order was entered. The primary concern was to get the matter corrected. It was inferred from the government's questioning of witnesses that the reason a cessation order was not entered was because it would have thrown 500-1000 people out of work.

weather could have rendered the mine inoperable. This has already happened in one instance.

The District of Columbia District Court's belief that the standards drawn by the act and regulations were "sufficiently specific to strictly control government action in order to reduce the risk of an erroneous deprivation", 456 F. Supp. at 1321, has been shown to be unfounded as the act has been applied. The evidence shows that in enforcing the law, OSM inspectors have issued unjustified and arbitrary cessation orders causing irreparable harm to the mining companies. As one example, three cessation orders were issued to Paramount Mining Corporation for "significant imminent environmental harm." All three orders were substantially vacated after formal hearings on grounds that they were improperly issued. Paramount Mining Corporation requested a speedy hearing and in this case, the hearings were held within twelve days of date of issuance which resulted in the administrative law judge dismissing the cessation order. In the meantime, while Paramount Mining Corporation was shut down, a heavy rainfall filled the pits with thirty feet of water, resulting in a loss of five thousand tons of recoverable coal with a value of one hundred sixty thousand dollars ($160,000). Furthermore, the company spent fifteen thousand dollars ($15,000) in engineering and attorneys' fees in appealing the cessation orders. In another instance, on October 23, 1978, the Pittston Coal Company's Moss #3 Preparation Plant was shut down by an OSM inspector who alleged that a coal slurry im-

(1975): "First, the private interest that will be affected by the official actions; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved in the fiscal and administrative burdens that the additional or substitute requirements would entail." [23] While the private interests are pecuniary in nature, there is a substantial likelihood of irreparable harm if the implemented procedures are followed. The margin of success in a small surface coal mining operation is often narrow. The halting of such an operation for even a day may lead to its economic collapse. On the other hand, there is a strong public interest in allowing the issuance of cessation orders when there is imminent danger to the health or safety of the public or when there is threat of significant imminent environmental harm to land, air, or water resources. There is no reason, however, why a matter of this kind cannot be presented for a temporary restraining order before a

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[23] The District of Columbia court did not utilize these factors to determine whether summary administrative action was proper, but rather approached the issue from the analysis set out in *Fuentes* v. *Shevin*, 407 U.S. 67, 91 (1972), although it did cite to *Mathews* v. *Eldridge*. 456 F. Supp. at 1320. In placing undue emphasis on the *Fuentes* analysis, the court did not have the opportunity to take into account the private interest affected nor the fiscal and administrative burdens that additional due process requirements would entail, as the *Mathews* v. *Eldridge* test requires. This court believes that these facts are important considerations that must be taken into account when dealing with peoples' livelihoods.

United States District Court judge or an administrative law judge within two hours' notice. This court takes judicial notice that the Western District of Virginia, which embraces the seven coal-producing counties involved in this case, has for the past several years had the highest weighted case load per judge of any federal court in the United States, yet can hear matters within a few hours' notice. Therefore, given the substantial nature of the interests served by more expedient review, and the relatively insubstantial burdens imposed thereby, the court concludes that the requirements of due process are not fulfilled by the current standards under which summary administrative action is meted out and the administrative review procedures, as presently constituted, do not fill in the void. For the same reason, the judicial review procedures do not fill in the void to afford mining operators suffering from operation of a cessation order or heavy penalties accompanying violation notices adequate procedural due process.

Because the evidence presented to this court indicates that OSM inspectors are issuing cessation orders when they are not justified, contrary to the conclusion reached by the District of Columbia District Court of the act and regulations in their virgin state, 456 F. Supp. 1301, 1321, the court is compelled to enjoin the issuance of cessation orders without a prior hearing. The irreparable harm to the operators outweighs the government's interest in summary action. Again, the court admonishes that a party can appear before a district court judge in the Western District of Vir-

ginia on a few hours' notice to obtain temporary relief.

The summary issuance of cessation orders is enjoined until such time as Congress makes provisions to correct the use of subjective criteria by OSM inspectors. More objective guidelines are needed to protect abuses of the cessation power. Once this is accomplished, the act appears to provide adequate due process guarantees for summary administrative action, with the exception of the five-day reply provision of § 525(c), 30 U.S.C. § 1275(c), the mine operators' avenue for temporary relief. If an operator is appealing from a cessation order granted under § 521(a)(2) or (a)(3), the Secretary must respond within five days of receipt of the request. This five-day lapse may be crucial to the continuation of a coal mine, especially considering the length of time it may take to get a request to the Secretary. Once the Secretary receives the request, he should have to grant or deny it within twenty-four (24) hours, rather than five days. If he denies the request, the mine operator may then proceed directly to the United States District Court for the district in which the surface coal mining operation is located. § 526(c), 30 U.S.C. § 1276(c). The court may then grant such temporary relief as it deems appropriate provided that all parties have been given notice and opportunity to be heard; the person requesting relief has shown that there is a substantial likelihood that he will prevail on the merits; and the relief will not adversely affect the

public health or safety or cause significant imminent environmental harm to our natural resources.

The court also concludes that mine operators are not afforded sufficient due process in connection with the imposition of violation notices. The sections when read together indicate that the mine operator has to pay any imposed penalty and cumulative penalties thereof prior to adjudication of fault. *Compare* § 518, 30 U.S.C. § 1268(b), *with* § 518(c), 30 U.S.C. § 1268(b). Accordingly, the civil penalty provision of the act, § 518, 30 U.S.C. § 1268, is enjoined until such time as adequate due process guarantees are afforded operators. Summary imposition of civil penalties may be allowed, provided that the operator has an avenue for temporary relief from such imposition. Section 525(c), 30 U.S.C. § 1275(c), discussed above with reference to cessation orders, will provide this relief if, for instance, a twenty-four hour reply provision is added to the section (at the present time the Secretary must reply "expeditiously"). Section 525 is enjoined until it provides adequate due process. In addition, the coal mine operator should be able to appeal to federal court for the same judicial review as provided by § 526(c) for cessation orders. Section 526(c) does not provide for such review as it stands at present.

This court does not mean to imply that the suggested remedies are the only ones available to Congress; however, the end result in any remedial process must be that the mine operator is not penalized before a hearing, either by assessment of penalties or cessation orders.

CONCLUSION

Therefore, a declaratory judgment and injunctive relief is hereby granted to the plaintiffs in part and denied in part. An Order will issue from the court in accordance with the opinions herein expressed.

The Clerk of this court is directed to send certified copies of this Memorandum Opinion to counsel of record.

ENTER: This 3rd day of January, 1980.

/s/ Illegible
United States District Judge

A TRUE COPY, TESTE:

JOYCE F. WITT,
Clerk

By: J. Todd
Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 79-1146

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., A & S COAL COMPANY, AMOS RIDGE COAL CO., BEVINS MINING CO., INC., BIG FORK COAL CO., BOB'S BRANCH COAL CO., BOSSCO, INC., BRADLEY BRANCH COAL CO., BRUSHY RIDGE COAL CO., BUCHANAN & SONS, BURNRITE COAL CO., CABOT COAL CORP., CARDINAL MINING LTD., CHAPARAL MINING CO., INC., CHARLES D. DALE CO., CLAUDE YEARLY COAL CO., CONLEY MULLINS COAL CO., CONWAY COAL CO., COPELAND COAL CO., CURT'S COAL CO., DEENA COAL CO., DOUBLE D COAL CO., ELKINS-KENDRICK ENTERPRISES, FIVE OAKS COAL CO., FLAT GAP MINING CO., GALE COAL CO., INC., GENOA COAL CO., G & O COAL CO., G & T COAL CO., H. B. ROWE & CO., H. C. BOSTIC COAL CO., INC., H.R.C. COAL CO., INC., HIGHLAND ENTERPRISES, HI HEAT COAL CO., HORN CONSTRUCTION CO., INC., HUMPHREYS ENTERPRISES, J. B. COAL CO., JIL-MAR COAL CO., INC., LYONS COAL CO., LAUREL CREEK COAL CO., M & M COAL CO., INC., MINERAL DEVELOPERS, INC., MULLINS COAL CO., MUD FORK COAL CO., COAL CO., BOB'S BRANCH COAL CO., BOSSCO, INC., NU-WAY COAL CO., PARAMOUNT MINING CORP., PERMAC, INC., PILOT COAL CORP., P & R COAL CO., RACE FORD COAL CORP., ROSEBUD, INC., RYDER COAL CO., S & M COAL CORP., ST. CHARLES MINING CO., STERLING MINING CO., TRACE COAL CO., TRI-

DALE COAL COMPANY, TURKEY BRANCH COAL CO., VALLEY FORK COAL CO., WISE DOCK COMPANY, W. D. MARTIN, CHARLES J. LOWRY, ROBERT W. KELLY, JR., A. F. KELLY, TOWN OF WISE, VIRGINIA; and COMMONWEALTH OF VIRGINIA, APPELLEES

-v-

CECIL D. ANDRUS, Secretary, U.S. Department of the Interior, APPELLANT

VIRGINIA CITIZENS FOR BETTER RECLAMATION, INC., and the TOWN OF ST. CHARLES, VIRGINIA, AMICI CURIAE

Appeal from the United States District Court for the Western District of Virginia at Big Stone Gap. Glen Williams, District Judge.

Argued: July 20, 1979 Decided: August 10, 1979.

Before BUTZNER, HALL, and PHILLIPS, Circuit Judges.

Michael A. McCord, Department of Justice, William Eichbaum, Associate Solicitor; Marc McGraw, Department of the Interior; James W. Moorman, Assistant Attorney General; Carl Strass, Alfred T. Ghiorzi, Carol Green, Department of Justice on brief) for Appellant; John L. Kilcullen (Kilcullen, Smith & Heenan on brief) for Appellees Virginia Surface Min-

ing and Reclamation Association, et al.; Roger L. Chaffe, Assistant Attorney General for Appellee The Commonwealth of Virginia; (Stephen C. Greenberg, Virginia Citizens for Better Reclaration, Inc.; Robert T. Copeland, Counsel for the Town of St. Charles, Virginia on brief) for Intervenors Amicus Curiae Virginia Citizens for Better Reclamation, Inc., and the Town of St. Charles, Virginia.

BUTZNER, Circuit Judge:

The Secretary of the Interior appeals an order of the district court granting Virginia Surface Mining and Reclamation Association, a number of coal companies, individual landowners, and the Town of Wise, Virginia an interlocutory injunction against enforcement of §§ 502-522 of the Surface Mining Control and Reclamation Act of 1977 [30 U.S.C. §§ 1252-1272]. The complaint against the Secretary sought declaratory and injunctive relief to prevent enforcement of the Act on grounds that it is an unconstitutional assumption of authority under the commerce clause and a violation of the fifth and tenth amendments. The district court applied the criteria set forth in Blackwelder Furniture Company v. Sealy Manufacturing Co., 550 F.2d 189 (4th Cir. 1977) for determining when a preliminary injunction should be issued. It ruled:

> [U]nless the court grants a temporary injunction now, plaintiffs will suffer irreparable injury; on the other hand, the defendant has introduced scant evidence to show that the issuance of the temporary injunction would substantially harm

> other interested parties or that the public interest would be adversely affected. Therefore under the *Blackwelder* test, it is not necessary for this court to determine whether the plaintiffs are likely to succeed on the merits of their suit.

Nevertheless, the court went on briefly to discuss the plaintiffs' constitutional challenge to the Act's reclamation requirements and its authorization for cessation orders. With respect to these provisions, the court concluded that the plaintiffs were likely to prevail on their allegation that the Act violated rights secured to them by the fifth amendment. The Court did not address the other constitutional objections alleged by the plaintiffs. The court's order enjoined the Secretary:

> from taking any action to enforce (by cessation order, permanent suspension or revocation, violation citations or notices, penalty, prosecution or otherwise) any and all provisions of §§ 502 through 522 [of the Act].

We believe that the district court applied an improper standard for granting relief and that it erred by failing to give any consideration to the congressional findings set forth in § 101 of the Act [30 U.S.C. § 1201]. Accordingly, we reverse the judgment and dissolve the interlocutory injunction.

The Surface Mining Act is a comprehensive statute designed, through interim and permanent measures, to establish nationwide, uniform regulations for surface coal mining operations in cooperation with the states. The Secretary of the Interior, acting through

terests affected by the Act. While these declarations do not conclusively establish the Act's constitutionality, a court considering the propriety of an injunction prohibiting enforcement of the Act must give them due consideration in determining whether the public interest will be adversely affected by its interlocutory order.

The judgment of the district court is reversed, and the injunction it entered February 14, 1979 is dissolved. The Clerk is directed to issue the mandate forthwith.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

[Filed Feb. 14, 1979]

Civil Action No. 78-0244-B

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., ET AL, PLAINTIFFS

and

TOWN OF WISE, VIRGINIA, INTERVENOR-PLAINTIFF

v.

CECIL D. ANDRUS, SECRETARY, U.S. DEPARTMENT OF THE INTERIOR, DEFENDANT

MEMORANDUM OPINION AND ORDER

A complaint to enjoin enforcement of the Surface Mining Control and Reclamation Act of 1977, Title 30 U.S.C. § 1201 *et seq.*, was filed on the 23rd day of October, 1978, by the Virginia Surface Mining and Reclamation Association, Inc., a voluntary, non-profit association of small coal producers, the principal purpose of which is to represent the interests of the coal mining industry in Virginia and to assist the public authorities in dealing with problems that affect the industry; by sixty-three (63) coal companies which are members of the association and are engaged or

have been engaged in surface coal mining operations in the Western District of Virginia; and by four (4) landowners, who are the owners of coal lands and mineral estate interests in coal lands on which surface coal mining operations are being conducted, or which are suitable for surface coal mining operations. Defendant Cecil D. Andrus, Secretary of the Interior, is charged with the responsibility for administering and enforcing the provisions of the Surface Mining Control and Reclamation Act of 1977, which was enacted into law by the United States Congress on August 3, 1977.

This court has jurisdiction of this action under Title 28 U.S.C. §§ 1331 and 2201.

Briefly summarized, the compaint alleges that the Surface Mining Control and Reclamation Act of 1977 is unconstitutional because the Act infringes upon power reserved to the States by the Tenth Amendment to the United States Constitution; that the reclamation requirements of the Act violate the Fifth Amendment to the United States Constitution, prohibiting the taking of private property without just compensation; that the power granted under the Act to the defendant to issue cessation orders without a hearing violates the due process clause of the Fifth Amendment to the United States Constitution; and that the Act violates the equal protection guarantee of the Fifth Amendment to the United States Constitution. Plaintiffs further allege that if the Act is enforced, they and other citizens of the Commonwealth of Virginia will suffer irreparable injuries in

violation of their rights guaranteed and protected by the Constitution of the United States, and for which injuries they have no adequate remedy at law. The plaintiffs petition the court to declare the Surface Mining Control and Reclamation Act of 1977 unconstitutional for the reasons above stated, and they seek a preliminary and a permanent injunction enjoining and restraining the Secretary of the Interior and his agents, employees and representatives from enforcing against the plaintiffs the unlawful and unconstitutional provisions of the Act.

On the 4th day of December, 1978, this court entered an Order granting the Town of Wise, Virginia, leave to intervene in this proceeding as a party plaintiff. The Town of Wise has filed a complaint alleging that it is irreparably harmed by the provisions of the Surface Mining Control and Reclamation Act of 1977 in that its tax revenue will be reduced because of the effects of the Act on employment in the area. The Town of Wise seeks the same relief as that sought by the original plaintiffs in this suit.

On the 10th day of January, 1979, plaintiffs filed a motion for a temporary injunction supported by affidavits and accompanied by a memorandum of law in support of the motion.

On the 22nd day of January, 1979, defendant Cecil D. Andrus filed a motion to dismiss the complaint accompanied by a memorandum in support of the motion.

On the 23rd day of January, 1979, this court entered an Order setting a hearing on the motion for a preliminary injunction for the 13th day of February, 1979, and further directed the defendant to submit any counter-affidavits in opposition to the motion for a temporary injunction on or before the 9th day of February, 1979. By Order dated February 2, 1979, this court also set arguments on the motion to dismiss filed by the defendant for the 13th day of February, 1979.

On the 6th day of February, 1979, this court granted the motion of Virginia Citizens for Better Reclamation, Inc., for leave to intervene as amicus curiae in support of the defendant and the court directed that their brief and supporting affidavits should be submitted no later than February 9, 1979.

On the 9th day of February, 1979, the plaintiffs filed additional affidavits in support of their motion for preliminary injunction and a brief in opposition to the motion to dismiss. Also, Virginia Citizens for Better Reclamation, Inc. filed affidavits and brief in opposition to the motion for temporary injunction. On the 12th day of February, the defendant filed a brief in opposition to the motion for preliminary injunction and an affidavit of Charles A. Beasley, Acting Regional Director, Region I, Office of Surface Mining and Enforcement, Department of the Interior.

On the 13th day of February, 1979, the Court heard direct testimony from David W. Harris, B. V. Cooper, Phillip Trent, Dennis Willis, James McClel-

lan, Curtis Bowers and Michael Quillen on behalf of the plaintiffs and Douglas Stone on behalf of the defendant.

FINDINGS OF FACT

For purposes of considering both the motion to dismiss filed by the defendant and the motion for a temporary injunction filed by the plaintiffs, this court must accept certain facts as undisputed inasmuch as these facts are supported by affidavits and accompanying documents and have not been contradicted by any counter-affidavits or other evidence.

The Surface Mining Control and Reclamation Act imposes stringent performance standards upon coal mining operations on slopes greater than 20°. Indeed, it is stated in the defendant's brief that one of the purposes of the Act is to prevent surface mining operations from being conducted where reclamation is not feasible. The primary thrust of the affidavits filed on behalf of the plaintiffs is that the Act makes surface mining economically prohibitive on slopes of 20° or greater. An examination of the Act confirms this contention.

The undisputed facts in this case show that the Act has its greatest impact on the land area located in the Western District of Virginia, since 95% of the coal reserves found in Virginia and capable of being strip mined are located on slopes with an incline greater than 20°. In fact, the Act is intended to focus on central Appalachia, consisting of the eastern part of Kentucky and parts of West Virginia and Vir-

ginia. The Act has only minimal impact on the entire western coal producing area of the United States, since no surface coal reserves are located on steep slopes in the mid-western states, and in all of the western states where there are large coal reserves, the only state adversely affected by the Act is Colorado, which has 10% of its coal reserves located on steep slopes. Even in the eastern United States, only 6% of Pennsylvania's reserves is found on steep slopes and only 9% of the coal found in Alabama is on steep slopes.

Some of the coal companies which are plaintiffs in this suit are located in Buchanan County, Virginia, in which county coal mining earnings represent 63.7% of the total income of the entire county. The evidence shows that the Act establishes performance standards which are designed to restrict or prevent the recovery of coal from 95% of the coal reserves in the Western District of Virginia, as contrasted with other states which are either totally unaffected or are minimally affected by the steep slope restrictions.

According to the evidence of Dennis v. Willis, a professional engineer registered in the states of Virginia, Kentucky, Tennessee and West Virginia, if it is assumed that an operator could in some way obtain a permit for surface mining, and considering that the average slope in Virginia is 26°, the increase in mining costs imposed by the Act could increase the cost of coal production in Virginia by as much as

73%. Since the cost of mining coal in most of the other coal producing states would not be increased at all, a mining operation in Virginia probably could not exist and compete due to the increased costs imposed by this Act. Therefore, assuming that the Act does permit mining on slopes in excess of 20°, the increased costs make it commercially impracticable to do so, and for this reason alone as much as 95% of the coal in Virginia could not be mined through surface mining.

Furthermore, the Act requires land that has been mined by surface mining to be restored to its original contour (with some possible exceptions) despite the fact that in many cases the land is more useful as flat land. The evidence of George E. Honeycutt shows examples of the use of land which has been surface mined and not restored to its original contour: at this time the Wise County, Virginia, Fairgrounds are located on a reclaimed surface mine; the airport at Wise, Virginia, is located on reclaimed surface mine land which was not restored to its original contour; also the Norton, Virginia, Community Hospital, the Norton Elementary School, a low-income housing development and a large shopping center are similarly located. The undisputed evidence also shows that in many of the counties in western Virginia, flat land is practically non-existent and needed for commercial, residential and public uses.

The evidence discloses that since the passage of the Surface Mining Control and Reclamation Act of

1977, twenty six (26) Virginia coal producing companies have gone out of business, due partly to the restrictions imposed by the Act.

The court also finds from the evidence that, since the Federal Act become effective, in excess of five hundred (500) coal miners have become unemployed in Southwest Virginia. Some of this unemployment is directly related to the Act, and many of these miners are now drawing unemployment benefits. The number of surface mining permits has plummeted, and thirty five (35) cessation orders have been issued by Federal inspectors, and, as a direct result, some coal companies were put out of business, even though later hearings exonerated the companies from any violation of the Act.

While the defendant contends that the public will be irreparably harmed if an injunction is issued in this case because of blasting, flooding and pollution, the weight of the evidence shows that with regard to blasting, those suffering property damage have an adequate remedy at law. As to flooding and pollution, the plaintiffs presented to the court documentary and expert testimony which, to say the least, renders it doubtful or inconclusive, that strip mining causes flooding or pollution.

CONCLUSIONS OF LAW

In determining the standards to be applied in ruling on the defendant's motion to dismiss and the plaintiffs' motion for a temporary injunction, the

seizing a rental yacht carrying marijuana, or seizing a mislabeled vitamin product, or appointing a conservator for a savings and loan association, or imposing rent control orders, or collecting federal revenue, or seizing enemy property. Such governmental actions are obviously distinguishable. For example, the collection of federal revenue in advance without a hearing only requires the taking of money, which the Government holds, and if the Government has improperly received it, it can be returned with interest. There is no irreparable damage in such a case to the party from whom the money is seized. The same reasoning applies to the seizure of a rental yacht, for if the person is operating a legitimate business, he can always rent a replacement yacht, and the seized yacht is not destroyed during the time it is held.

In the instant case, the court is concerned with cessation orders, which can prohibit a person from using his own land or interest in land. The Government has failed to show this court any case in which the Federal Government, without a hearing, forced a person not to use his own land, particularly under circumstances such as mining, where the harm may very well be irreparable. This court believes that to require a person to cease mining, without proper notice or opportunity for a hearing, is a flagrant violation of the Fifth Amendment to the Constitution of the United States, which requires that a hearing be conducted prior to such a taking. This court is of the opinion that the plaintiffs have shown a strong

likelihood of prevailing on at least these two issues in this case.

Therefore, this court having fully considered the plaintiffs' motion for a preliminary injunction, together with the various affidavits submitted therewith, and the respective memoranda submitted by the plaintiffs and the defendant, and having heard oral argument thereon, it is hereby ADJUDGED AND DECREED that defendant and all persons serving as officers, employees and agents subject to his control and direction, are hereby enjoined and restrained, until such time as this court renders a final judgment or decree on the matter complained of in the complaint and embraced in such motion for a preliminary injunction, from taking any action to enforce (by cessation order, permit suspension or revocation, violation citations or notices, penalty, prosecution or otherwise) any and all provisions of sections 502 through 522 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1252-1272.

It is further ORDERED that a hearing is hereby set for the purpose of presenting such evidence as may be desired by either party and further arguments on behalf of any parties, as to whether a permanent injunction shall be granted in this case. Such hearing shall commence at 9:30 a.m. on the 26 day of March, 1979, at Big Stone Gap.

The Clerk of this court is directed to send certified copies of this Memorandum Opinion and Order to counsel of record.

ENTER: This 14th day of February, 1979.

/s/ Glen M. Williams
GLEN M. WILLIAMS
United States District Judge

A TRUE COPY, TESTE:
JOYCE F. WITT,
Clerk

By: J. Todd
J. TODD
Deputy Clerk

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

Civ. No. 78-0224-B

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., ET AL., PLAINTIFFS

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,

and

VIRGINIA CITIZENS FOR BETTER RECLAMATION, INC., ET AL., DEFENDANTS

[Filed Feb. 1, 1980]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Secretary of the Interior, one of the defendants in this case, appeals to the Supreme Court of the United States from the final order and judgment entered in this action January 3, 1980, and from the order of January 21, 1980, amending the prior order.

This appeal is taken pursuant to 28 U.S.C. 1252 and 2101

Respectfully submitted,

E. MONTGOMERY TUCKER
United States Attorney

MORGAN E. SCOTT, JR.
Assistant United States Attorney

/s/ Andrew F. Walch
ANDREW F. WALCH
Attorney,
Department of Justice
Land and Natural Resources
Division
Benjamin Franklin Station
P.O. Box 7415
Washington, D.C. 20044

I hereby certify that a copy of the foregoing Notice of Appeal to the Supreme Court of the United States was mailed, postage prepaid, this 30th day of January 1980, addressed to the following:

Roger L. Chaffe, Esquire
Assistant Attorney General
Supreme Court Building
1101 East Broad Street
Richmond, Virginia 23219

Robert T. Winston, Esquire
The Law Building
Norton, Virginia 24273

Kenneth T. Asbury, Esquire
Post Office Box 336
Wise, Virginia 24293

Steven C. Greenberg, Esquire
Post Office Box 390
St. Paul, Virginia 24283

John L. Kilcullen, Esquire
1800 M Street, N.W.
Suite 600, North Lobby
Washington, D.C. 20036

/s/ Andrew F. Walch
ANDREW F. WALCH
Attorney,
Department of Justice
Land and Natural Resources Division
Benjamin Franklin Station
P.O. Box 7415
Washington, D.C. 20044

APPENDIX H

SUPREME COURT OF THE UNITED STATES

Nos. A-720 and A-725

CECIL D. ANDRUS, SECRETARY OF INTERIOR, APPLICANT,

v.

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., ET AL.; and

VIRGINIA CITIZENS FOR BETTER RECLAMATION, INC., ET AL., APPLICANT,

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., ET AL.

ON CONSIDERATION of the applications for stay of judgment of the United States District Court for the Western District of Virginia, No. 78-0224-B, entered January 3, 1980 as amended January 21, 1980.

IT IS ORDERED by this Court that the said applications be, and the same are hereby, granted pending the timely filing and disposition of the appeals in this Court.

March 17, 1980

A true copy
Test: MICHAEL RODAK, JR.
Clerk of the Supreme Court
of the United States

By: /s/ Francis J. Lorson
Deputy

APPENDIX I

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Tenth Amendment to the Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Section 101 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. I) 1201, provides:

> The Congress finds and declares that—
>
> (a) extraction of coal and other minerals from the earth can be accomplished by various methods of mining, including surface mining;
>
> (b) coal mining operations presently contribute significantly to the Nation's energy requirements; surface coal mining constitutes one method of extraction of the resource; the overwhelming percentage of the Nation's coal reserves can only be extracted by underground mining methods, and it is, therefore, essential to

the national interest to insure the existence of an expanding and economically healthy underground coal mining industry;

(c) many surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources;

(d) the expansion of coal mining to meet the Nation's energy needs makes even more urgent the establishment of appropriate standards to minimize damage to the environment and to productivity of the soil and to protect the health, and safety of the public.

(e) surface mining and reclamation technology are now developed so that effective and reasonable regulation of surface coal mining operations by the States and by the Federal Government in accordance with the requirements of this Act is an appropriate and necessary means to minimize so far as practicable the adverse social, economic, and environmental effects of such mining operations;

(f) because of the diversity in terrain, climate, biologic, chemical, and other physical con-

(b) All surface coal mining operations on lands on which such operations are regulated by a State which commence operations pursuant to a permit issued on or after six months from the date of enactment of this Act shall comply, and such permits shall contain terms requiring compliance with, the provisions set out in subsection (c) of this section. Prior to final disapproval of a State program or prior to promulgation of a Federal program or a Federal lands program pursuant to this Act, a State may issue such permits.

(c) On and after nine months from the date of enactment of this Act, all surface coal mining operations on lands on which such operations are regulated by a State shall comply with the provisions of subsections 515(b)(2), 515(b)(3), 515(b)(5), 515(b)(10), 515(b)(13), 515(b)(15), 515(b)(19), and 515(d) of this Act or, where a surface coal mining operation will remove an entire coal seam or seams running through the upper fraction of a mountain, ridge, or hill by removing all of the overburden and creating a level plateau or a gently rolling contour with no highwalls remaining, such operation shall comply with the requirements of section 515(c) (4) and (5) without regard to the requirements of section 515(b)(3) or 515(d)(2) and (3) with respect to lands from which overburden and the coal seam being mined have not been removed: *Provided, however,* That surface coal mining operations in operation pursuant to a permit issued by a State before the date of enactment of this Act, issued to a person as defined in section 701(19) in existence prior

to May 2, 1977 and operated by a person whose total annual production of coal from surface and underground coal mining operations does not exceed one hundred thousand tons shall not be subject to the provisions of this subsection except with reference to the provision of subsection 515 (d) (1) until January 1, 1979.

(d) Not later than two months following the approval of a State program pursuant to section 503 or the implementation of a Federal program pursuant to section 504, regardless of litigation contesting that approval or implementation, all operators of surface coal mines in expectation of operating such mines after the expiration of eight months from the approval of a State program or the implementation of a Federal program, shall file an application for a permit with the regulatory authority. Such application shall cover those lands to be mined after the expiration of eight months from the approval of a State program or the implementation of a Federal program. The regulatory authority shall process such applications and grant or deny a permit within eight months after the date of approval of the State program or the implementation of the Federal program, unless specially enjoined by a court of competent jurisdiction, but in no case later than forty-two months from the date of enactment of this Act.

(e) Within six months after the date of enactment of this Act, the Secretary shall implement a Federal enforcement program which shall remain in effect in each State as surface coal mining operations are required to comply with the provisions of this Act, until the State

program has been approved pursuant to this Act or until a Federal program has been implemented pursuant to this Act. The enforcement program shall—

(1) include inspections of surface coal mine sites which may be made (but at least one inspection for every site every six months), without advance notice to the mine operator and for the purpose of ascertaining compliance with the standards of subsections (b) and (c) above. The Secretary shall order any necessary enforcement action to be implemented pursuant to the Federal enforcement provision of this title to correct violations identified at the inspections;

(2) provide that upon receipt of inspection reports indicating that any surface coal mining operation has been found in violation of subsections (b) and (c) above, during not less than two consecutive State inspections or upon receipt by the Secretary of information which would give rise to reasonable belief that such standards are being violated by any surface coal mining operation, the Secretary shall order the immediate inspection of such operation by Federal inspectors and the necessary enforcement actions, if any, to be implemented pursuant to the Federal enforcement provisions of this title. When the Federal inspection results from information provided to the Secretary by any person, the Secretary shall notify such person when the Federal inspec-

tion is proposed to be carried out and such person shall be allowed to accompany the inspector during the inspection;

(3) provide that the State regulatory agency file with the Secretary and with a designated Federal office centrally located in the county or area in which the inspected surface coal mine is located copies of inspection reports made;

(4) provide that moneys authorized by section 712 shall be available to the Secretary prior to the approval of a State program pursuant to this Act to reimburse the State for conducting those inspections in which the standards of this Act are enforced and for the administration of this section.

(5) for purposes of this section, the term "Federal inspector" means personnel of the Office of Surface Mining Reclamation and Enforcement and such additional personnel of the United States Geological Survey, Bureau of Land Management, or of the Mining Enforcement and Safety Administration so designated by the Secretary, or such other personnel of the Forest Service, Soil Conservation Service, or the Agricultural Stabilization and Conservation Service as arranged by appropriate agreement with the Secretary on a reimbursable or other basis;

(f) Following the final disapproval of a State program, and prior to promulgation of a Federal program or a Federal lands program pursuant

to this Act, including judicial review of such a program, existing surface coal mining operations may continue surface mining operations pursuant to the provisions of section 502 of this Act. During such period no new permits shall be issued by the State whose program has been disapproved. Permits which lapse during such period may continue in full force and effect until promulgation of a Federal program or a Federal lands program.

Section 503 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. I) 1253, provides:

(a) Each State in which there are or may be conducted surface coal mining operations on non-Federal lands, and which wishes to assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations, except as provided in sections 521 and 523 and title IV of this Act, shall submit to the Secretary, by the end of the eighteenth-month period beginning on the date of enactment of this Act, a State program which demonstrates that such State has the capability of carrying out the provisions of this Act and meeting its purposes through—

(1) a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act;

(2) a State law which provides sanctions for violations of State laws, regulations, or conditions of permits concerning surface coal mining and reclamation operations, which

sanctions shall meet the minimum requirements of this Act, including civil and criminal actions, forfeiture of bonds, suspensions, revocations, and withholding of permits, and the issuance of cease-and-desist orders by the State regulatory authority or its inspectors;

(3) a State regulatory authority with sufficient administrative and technical personnel, and sufficient funding to enable the State to regulate surface coal mining and reclamation operations in accordance with the requirements of this Act;

(4) a State law which provides for the effective implementations, maintenance, and enforcement of a permit system, meeting the requirements of this title for the regulations of surface coal mining and reclamation operations for coal on lands within the State;

(5) establishment of a process for the designation of areas as unsuitable for surface coal mining in accordance with section 522 provided that the designation of Federal lands unsuitable for mining shall be performed exclusively by the Secretary after consultation with the State; and

(6) establishment for the purposes of avoiding duplication, of a process for coordinating the review and issuance of permits for surface coal mining and reclamation operations with any other Federal or State permit process applicable to the proposed operations; and

(7) rules and regulations consistent with regulations issued by the Secretary pursuant to this Act.

(b) The Secretary shall not approve any State program submitted under this section until he has—

(1) solicited and publicly disclosed the views of the Administrator of the Environmental Protection Agency, the Secretary of Agriculture, and the heads of other Federal agencies concerned with or having special expertise pertinent to the proposed State program;

(2) obtained the written concurrence of the Administrator of the Environmental Protection Agency with respect to those aspects of a State program which relate to air or water quality standards promulgated under the authority of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1151-1175), and the Clean Air Act, as amended (42 U.S.C. 1857 et seq.);

(3) held at least one public hearing on the State program within the State; and

(4) found that the State has the legal authority and qualified personnel necessary for the enforcement of the environmental protection standards.

The Secretary shall approve or disapprove a State program, in whole or in part, within six full calendar months after the date such State program was submitted to him.

(c) If the Secretary disapproves any proposed State program in whole or in part, he shall notify the State in writing of his decision and set forth in detail the reasons therefor. The State shall have sixty days in which to resubmit a revised

State program or portion thereof. The Secretary shall approve or disapprove the resubmitted State program or portion thereof within sixty days from the date of resubmission.

(d) For the purposes of this section and section 504, the inability of a State to take any action the purpose of which is to prepare, submit or enforce a State program, or any portion thereof, because the action is enjoined by the issuance of an injunction by any court of competent jurisdiction shall not result in a loss of eligibility for financial assistance under titles IV and VII of this Act or in the imposition of a Federal program. Regulation of the surface coal mining and reclamation operations covered or to be covered by the State program subject to the injunction shall be conducted by the State pursuant to section 502 of this Act, until such time as the injunction terminates or for one year, whichever is shorter, at which time the requirements of sections 503 and 504 shall again be fully applicable.

Section 504 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. I) 1254, provides:

(a) The Secretary shall prepare and, subject to the provisions of this section, promulgate and implement a Federal program for a State no later than thirty-four months after the date of enactment of this Act if such State—

(1) fails to submit a State program covering surface coal mining and reclamation operations by the end of the eighteen-month period begining on the date of enactment of this Act;

(2) fails to resubmit an acceptable State program within sixty days of disapproval of a proposed State program: *Provided*, That the Secretary shall not implement a Federal program prior to the expiration of the initial period allowed for submission of a State program as provided for in clause (1) of this subsection; or

(3) fails to implement, enforce, or maintain its approved State program as provided for in this Act.

If State compliance with clause (1) of this subsection requires an act of the State legislature, the Secretary may extend the period of submission of a State program up to an additional six months. Promulgation and implementation of a Federal program vests the Secretary with exclusive jurisdiction for the regulation and control of surface coal mining and reclamation operations taking place on lands within any State not in compliance with this Act. After promulgation and implementation of a Federal program the Secretary shall be the regulatory authority. If a Federal program is implemented for a State, section 522(a), (c), and (d) shall not apply for a period of one year following the date of such implementation. In promulgating and implementing a Federal program for a particular State the Secretary shall take into consideration the nature of that State's terrain, climate, biological, chemical, and other relevant physical conditions.

(b) In the event that a State has a State program for surface coal mining, and is not en-

subsection, and may impose such additional requirements as he deems to be necessary.

(6) All exceptions granted under the provisions of this subsection shall be reviewed not more than three years from the date of issuance of the permit, unless the permittee affimatively demonstrates that the proposed development is proceeding in accordance with the terms of the reclamation plan.

Section 518 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. I) 1268, provides:

(a) In the enforcement of a Federal program or Federal lands program, or during Federal enforcement pursuant to section 502 or during Federal enforcement of a State program pursuant to section 521 of this Act, any permittee who violates any permit condition or who violates any other provision of this title, may be assessed a civil penalty by the Secretary, except that if such violation leads to the issuance of a cessation order under section 521, the civil penalty shall be assessed. Such penalty shall not exceed $5,000 for each violation. Each day of continuing violation may be deemed a separate violation for purposes of penalty assessments. In determining the amount of the penalty, consideration shall be given to the permittee's history of previous violations at the particular surface coal mining operation; the seriousness of the violation, including any irreparable harm to the environment and any hazard to the health or safety of the public;

whether the permittee was negligent; and the demonstrated good faith of the permittee charged in attempting to achieve rapid compliance after notification of the violation.

(b) A civil penalty shall be assessed by the Secretary only after the person charged with a violation described under subsection (a) of this section has been given an opportunity for a public hearing. Where such a public hearing has been held, the Secretary shall make findings of fact, and he shall issue a written decision as to the occurrence of the violation and the amount of the penalty which is warranted, incorporating, when appropriate, an order therein requiring that the penalty be paid. When appropriate, the Secretary shall consolidate such hearings with other proceedings under section 521 of this Act. Any hearing under this section shall be of record and shall be subject to section 554 of title 5 of the United States Code. Where the person charged with such a violation fails to avail himself of the opportunity for a public hearing, a civil penalty shall be assessed by the Secretary after the Secretary has determined that a violation did occur, and the amount of the penalty which is warranted, and has issued an order requiring that the penalty be paid.

(c) Upon the issuance of a notice or order charging that a violation of the Act has occurred, the Secretary shall inform the operator within thirty days of the proposed amount of said penalty. The person charged with the penalty shall then have thirty days to pay the proposed penalty in full or, if the person wishes to contest either the amount of the penalty or the

fact of the violation, forward the proposed amount to the Secretary for placement in an escrow account. If through administrative or judicial review of the proposed penalty, it is determined that no violation occurred, or that the amount of the penalty should be reduced, the Secretary shall within thirty days remit the appropriate amount to the person, with interest at the rate of 6 percent, or at the prevailing Department of the Treasury rate, whichever is greater. Failure to forward the money to the Secretary within thirty days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty.

(d) Civil penalties owed under this Act, may be recovered in a civil action brought by the Attorney General at the request of the Secretary in any appropriate district court of the United States.

(e) Any person who willfully and knowingly violates a condition of a permit issued pursuant to a Federal program, a Federal lands program or Federal enforcement pursuant to section 502 or during Federal enforcement of a State program pursuant to section 521 of this Act or fails or refuses to comply with any order issued under section 521 or section 526 of this Act, or any order incorporated in a final decision issued by the Secretary under this Act, except an order incorporated in a decision issued under subsection (b) of this section or section 704 of this Act, shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than one year or both.

(f) Whenever a corporate permittee violates a condition of a permit issued pursuant to a Federal program, a Federal lands program or Federal enforcement pursuant to section 502 or Federal enforcement of a State program pursuant to section 521 of this Act or fails or refuses to comply with any order issued under section 521 of this Act, or any order incorporated in a final decision issued by the Secretary under this Act except an order incorporated in a decision issued under subsection (b) of this section or section 703 of this Act, any director, officer, or agent of such corporation who willfully and knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (e) of this section.

(g) Whoever knowingly makes any false statement, representation, or certification, or knowingly fails to make any statement, representation, or certification in any application, record, report, plant, or other document filed or required to be maintained pursuant to a Federal program or a Federal lands program or any order of decision issued by the Secretary under this Act, shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than one year or both.

(h) Any operator who fails to correct a violation for which a citation has been issued under section 521(a) within the period permitted for its correction (which period shall not end until the entry of a final order by the Secretary, in

the case of any review proceedings under section 525 initiated by the operator wherein the Secretary orders, after an expedited hearing, the suspension of the abatement requirements of the citation after determining that the operator will suffer irreparable loss or damage from the application of those requirements, or until the entry of an order of the court, in the case of any review proceedings under section 526 initiated by the operator wherein the court orders the suspension of the abatement requirements of the citation), shall be assessed a civil penalty of not less than $750 for each day during which such failure or violation continues.

(i) As a condition of approval of any State program submitted pursuant to section 503 of this Act, the civil and criminal penalty provisions thereof shall, at a minimum, incorporate penalties no less stringent than those set forth in this section, and shall contain the same or similar procedural requirements relating thereto. Nothing herein shall be construed so as to eliminate any additional enforcement right or procedures which are available under State law to a State regulatory authority but which are not specifically enumerated herein.

Section 521(a) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. I) 1271 (a), provides:

(1) Whenever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of

any requirement of this Act or any permit condition required by this Act, the Secretary shall notify the State regulatory authority, if one exists, in the State in which such violation exists. If no such State authority exists or the State regulatory authority fails within ten days after notification to take appropriate action to cause said violation to be corrected or to show good cause for such failure and transmit notification of its action to the Secretary, the Secretary shall immediately order Federal inspection of the surface coal mining operation at which the alleged violation is occurring unless the information available to the Secretary is a result of a previous Federal inspection of such surface coal mining operation. The ten-day notification period shall be waived when the person informing the Secretary provides adequate proof that an imminent danger of significant environmental harm exists and that the State had failed to take appropriate action. When the Federal inspection results from information provided to the Secretary by any person, the Secretary shall notify such person when the Federal inspection is proposed to be carried out and such person shall be allowed to accompany the inspector during the inspection.

(2) When, on the basis of any Federal inspection, the Secretary or his authorized representative determines that any condition or practices exist, or that any permittee is in violation of any requirement of this Act or any permit condition required by this Act, which condition, practice, or violation also creates an imminent danger to the health or safety of the public, or

is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources, the Secretary or his authorized representative shall immediately order a cessation of surface coal mining and reclamation operations or the portion thereof relevant to the condition, practice, or violation. Such cessation order shall remain in effect until the Secretary or his authorized representative determines that the condition, practice, or violation has been abated, or until modified, vacated, or terminated by the Secretary or his authorized representative pursuant to subparagraph (a)(5) of this section. Where the Secretary finds that the ordered cessation of surface coal mining and reclamation operations, or any portion thereof, will not completely abate the imminent danger to health or safety of the public or the significant imminent environmental harm to land, air, or water resources, the Secretary shall, in addition to the cessation order, impose affirmative obligations on the operator requiring him to take whatever steps the Secretary deems necessary to abate the imminent danger or the significant environmental harm.

(3) When, on the basis of a Federal inspection which is carried out during the enforcement of a Federal program or a Federal lands program, Federal inspection pursuant to section 502, or section 504(b) or during Federal enforcement of a State program in accordance with subsection (b) of this section, the Secretary or his authorized representative determines that any permittee is in violation of any require-

ment of this Act or any permit condition required by this Act; but such violation does not create an imminent danger to the health or safety of the public, or cannot be reasonably expected to cause significant, imminent environmental harm to land, air, or water resources, the Secretary or authorized representative shall issue a notice to the permittee or his agent fixing a reasonable time but not more than ninety days for the abatement of the violation and providing opportunity for public hearing.

If, upon expiration of the period of time as originally fixed or subsequently extended, for good cause shown and upon the written finding of the Secretary or his authorized representative, the Secretary or his authorized representative finds that the violation has not been abated, he shall immediately order a cessation of surface coal mining and reclamation operations or the portion thereof relevant to the violation. Such cessation order shall remain in effect until the Secretary or his authorized representative determines that the violation has been abated, or until modified, vacated, or terminated by the Secretary or his authorized representative pursuant to subparagraph (a)(5) of this section. In the order of cessation issued by the Secretary under this subsection, the Secretary shall determine the steps necessary to abate the violation in the most expeditious manner possible, and shall include the necessary measures in the order.

(4) When, on the basis of a Federal inspection which is carried out during the enforce-

ment of a Federal program or a Federal lands program, Federal inspection pursuant to section 502 or section 504 or during Federal enforcement of a State program in accordance with subsection (b) of this section, the Secretary or his authorized representative determines that a pattern of violations of any requirements of this Act or any permit conditions required by this Act exists or has existed, and if the Secretary or his authorized representative also find that such violations are caused by the unwarranted failure of the permittee to comply with any requirements of this Act or any permit conditions, or that such violations are willfully caused by the permittee, the Secretary or his authorized representative shall forthwith issue an order to the permittee to show cause as to why the permit should not be suspended or revoked and shall provide opportunity for a public hearing. If a hearing is requested the Secretary shall inform all interested parties of the time and place of the hearing. Upon the permittee's failure to show cause as to why the permit should not be suspended or revoked, the Secretary or his authorized representative shall forthwith suspend or revoke the permit.

(5) Notices and orders issued pursuant to this section shall set forth with reasonable specificity the nature of the violation and the remedial action required, the period of time established for abatement, and a reasonable description of the portion of the surface coal mining and reclamation operation to which the notice or order applies. Each notice or order issued under this section shall be given promptly to the per-

vided, however, That surface coal mining operations may be permitted on such lands if the Secretary finds that there are no significant recreational, timber, economic, or other values which may be incompatible with such surface mining operations and—

(A) surface operations and impacts are incident to an underground coal mine; or

(B) where the Secretary of Agriculture determines, with respect to lands which do not have significant forest cover within those national forests west of the 100th meridian, that surface mining is in compliance with the Multiple-Use Sustained-Yield Act of 1960, the Federal Coal Leasing Amendments Act of 1975, the National Forest Management Act of 1976, and the provisions of this Act: *And provided further,* That no surface coal mining operations may be permitted within the boundaries of the Custer National Forest;

(3) which will adversely affect any publicly owned park or places included in the National Register of Historic Sites unless approved jointly by the regulatory authority and the Federal, State, or local agency with jurisdiction over the park or the historic site;

(4) within one hundred feet of the outside right-of-way line of any public road, except where mine access roads or haulage

roads join such right-of-way line and except that the regulatory authority may permit such roads to be relocated or the area affected to lie within one hundred feet of such road, if after public notice and opportunity for public hearing in the locality a written finding is made that the interests of the public and the landowners affected thereby will be protected; or

(5) within three hundred feet from any occupied dwelling, unless waived by the owner thereof, nor within three hundred feet of any public building, school, church, community, or institutional building, public park, or within one hundred feet of a cemetery.

Section 525 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. I) 1275, provides:

SEC. 525. (a) (1) A permittee issued a notice or order by the Secretary pursuant to the provisions of subparagraphs (a) (2) and (3) of section 521 of this title, or pursuant to a Federal program or the Federal lands program or any person having an interest which is or may be adversely affected by such notice or order or by any modification, vacation, or termination of such notice or order, may apply to the Secretary for review of the notice or order within thirty days of receipt thereof or within thirty days of its modification, vacation, or termination. Upon receipt of such application, the Secretary shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an

opportunity for a public hearing, at the request of the applicant or the person having an interest which is or may be adversely affected, to enable the applicant or such person to present information relating to the issuance and continuance of such notice or order or the modification, vacation, or termination thereof. The filing of an application for review under this subsection shall not operate as a stay of any order or notice.

(2) The permittee and other interested persons shall be given written notice of the time and place of the hearing at least five days prior thereto. Any such hearing shall be of record and shall be subject to section 554 of title 5 of the United States Code.

(b) Upon receiving the report of such investigation, the Secretary shall make findings of fact, and shall issue a written decision, incorporating therein an order vacating, affirming, modifying or terminating the notice or order, or the modification, vacation, or termination of such notice or order complained of and incorporate his findings herein. Where the application for review concerns an order for cessation of surface coal mining and reclamation operations issued pursuant to the provisions of subparagraph (a)(2) or (a)(3) of section 521 of this title, the Secretary shall issue the written decision within thirty days of the receipt of the application for review, unless temporary relief has been granted by the Secretary pursuant to subparagraph (c) of this section or by the court pursuant to subparagraph (c) of section 526 of this title.

(c) Pending completion of the investigation and hearing required by this section, the appli-

cant may file with the Secretary a written request that the Secretary grant temporary relief from any notice or order issued under section 521 of this title, a Federal program or the Federal lands program together with a detailed statement giving reasons for granting such relief. The Secretary shall issue an order or decision granting or denying such relief expeditiously: *Provided*, That where the applicant requests relief from an order for cessation of coal mining and reclamation operations issued pursuant to subparagraph (a)(2) or (a)(3) of section 521 of this title, the order or decision on such a request shall be issued within five days of its receipt. The Secretary may grant such relief, under such conditions as he may prescribe, if—

(1) a hearing has been held in the locality of the permit area on the request for temporary relief in which all parties were given an opportunity to be heard;

(2) the applicant shows that there is substantial likelihood that the findings of the Secretary will be favorable to him; and

(3) such relief will not adversely affect the health or safety of the public or cause significant, imminent environmental harm to land, air, or water resources.

(d) Following the issuance of an order to show cause as to why a permit should not be suspended or revoked pursuant to section 521, the Secretary shall hold a public hearing after giving written notice of the time, place, and date thereof. Any such hearing shall be of record and shall be subject to section 554 of title

5 of the United States Code. Within sixty days following the public hearing, the Secretary shall issue and furnish to the permittee and all other parties to the hearing a written decision, and the reasons therefor, concerning suspension or revocation of the permit. If the Secretary revokes the permit, the permittee shall immediately cease surface coal mining operations on the permit area and shall complete reclamation within a period specified by the Secretary, or the Secretary shall declare as forfeited the performance bonds for the operation.

(e) Whenever an order is issued under this section, or as a result of any administrative proceeding under this Act, at the request of any person, a sum equal to the aggregate amount of all costs and expenses (including attorney fees) as determined by the Secretary to have been reasonably incurred by such person for or in connection with his participation in such proceedings, including any judicial review of agency actions, may be assessed against either party as the court, resulting from judicial review or the Secretary, resulting from administrative proceedings, deems proper.

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